

(16,617.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 404.

THE UNITED STATES *EX REL.* ALFRED L. BERNARDIN,
PLAINTIFF IN ERROR,

vs.

BENJAMIN BUTTERWORTH, COMMISSIONER OF
PATENTS.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

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a Court of Appeals of the District of Columbia, April Term,
1897.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN, }
Appellant, } vs.
BENJAMIN BUTTERWORTH, Commissioner of } Patents. } No. 682. Special
Calendar, No. 6.

Appeal from the Supreme Court of the District of Columbia.

Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN }
vs.
BENJAMIN BUTTERWORTH, Commissioner of } At Law. No. 40946.
Patents.

UNITED STATES OF AMERICA, }
District of Columbia, }
88:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

Filed April 17, 1897.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN }
vs.
BENJAMIN BUTTERWORTH, Commissioner of } At Law. 40946.
Patents.

Petition for Mandamus.

The relator, Alfred L. Bernardin, says he is a citizen of the United States and residing in Evansville, Indiana, and that during the latter part of February, 1892, to wit, about the 25th day of February, he invented a new and useful improvement in metallic bottle-sealing devices, which was not known or used by others in this country, nor patented nor described in any printed publication in this or any foreign country before his invention or discovery thereof, nor in public use or on sale for more than two years prior to his application; that upon July 21st, 1892, he filed his application—serial No., 440,790—in the U. S. Patent Office for letters patent for the aforesaid device, of which your relator believes himself to be the first and original inventor; that the said application was made in writing in due form, as required by statute, in every particular,

2 THE UNITED STATES EX REL. ALFRED L. BERNARDIN VS.

and that your relator, Alfred L. Bernardin, filed therewith, in the Patent Office of the United States, a certain written description of the same, and the manner of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected to make, construct, and use the same, and did explain the principle thereof and the best mode in which he has contemplated applying that principle so as to distinguish it from all other inventions, and did particularly point out and distinctly claim the particular improvement and combination which he claims as his invention, as follows:

1st. A metallic bottle-sealing cap having its lower edge adapted to be pressed into contact with a locking shoulder and provided above the said edge with a circumferential outwardly projecting rib or bead for engagement by the removing tool.

2nd. The improved bottle-sealing cap herein described provided on its depending flange with an outwardly projecting rib or bead having its sections 1 and 2 approximately flat whereby to afford a firm bearing for engagement by the removing tool and having said sections joined at their outer edges by an acute bend, whereby such joint and the proximity of the sections 1 and 2 of the bead will tend to strengthen and give rigidity to said bead.

3rd. The combination substantially as described of the bottle having its neck provided with a locking shoulder and the cap fitted on said bottle pressed into continuous contact with the locking shoulder and provided with a circumferential outwardly projected bead arranged for engagement by the removing tool.

4th. The improvement in bottle closures substantially as herein described and shown consisting of the bottle provided near its lip with a locking shoulder, the cap fitted on said bottle and having its lower edge pressed into continuous contact with the locking shoulder and provided above said contact with an outwardly projecting bead having flat sections 1 and 2 and arranged for engagement by the removing tool.

5th. The combination substantially as herein described of the bottle provided with a locking shoulder, the cap fitted to said bottle and having the lower edge of its depending flange pressed into contact with the locking shoulder and provided above said lower edge with an outwardly projected portion having its upper side arranged below the top of the cap and adapted to form a bearing for engagement by the cap-removing tool.

6th. The metallic bottle-sealing cap having its lower edge adapted to be pressed into contact with a locking shoulder and provided above the said edge with a circumferential outwardly projecting rib or bead for engagement by the removing tool, said rib or bead having its upper side arranged below the plane of the top of the cap.

That said specification and claims were duly signed by your relator, Alfred L. Bernardin, as such inventor, and were duly attested by two witnesses.

That your relator, Alfred L. Bernardin, did further furnish draw-

ings of said invention, signed by the attorneys of your relator, Alfred L. Bernardin, and attested by two witnesses.

That your relator, Alfred L. Bernardin, did further make oath that he verily believed himself to be the original and first and sole inventor and discoverer of the same, for which he solicited a patent; that he did not know and did not believe that the same was ever before known or used, and did state the country whereof he was a citizen.

That your relator, Alfred L. Bernardin, did further, at the time of making such application, pay to John S. Seymour, the then Commissioner of Patents, all fees required by law.

That, upon the filing of such application and the payment of the fees required therefor by law, the said John S. Seymour, then Commissioner of Patents, did cause an examination to be made of the new invention set forth, contained, and described in said application, description, and drawings; that upon the said examination it was the opinion of the said John S. Seymour, then Commissioner of Patents, that the invention was new and useful; that your relator was the first and original inventor, and that your relator was entitled to letters patent for his invention, and thereupon, on October 15, 1892, his application was allowed.

That on or about February 10, 1893, this application was withdrawn from issue for the purpose of interference, and on February 24th, 1893, upon due proceedings, an interference was declared with the application of William Painter—serial No., 458,549—filed January 16, 1893; that on March 31st, 1893, William H. Northall filed an application—serial No., 468,524—for letters patent for the same invention, which application was on April 7, 1893, added to said interference between Bernardin and Painter; that the case of this interference duly coming on to be heard before the examiner of interferences according to statutes, rules, and regulations of the Patent Office in that case made and provided, upon the respective statements, testimony, and proofs of your relator, said Northall, and said Painter, prepared and presented according to the rules and regulations of the Patent Office, the examiner of interferences did decide that said William H. Northall was the original and first inventor of the said improvement in bottle-sealing devices, and that he was entitled to letters patent therefor.

That your relator, Alfred L. Bernardin, then appealed from this decision to the examiners-in-chief, according to the provisions of the statute and the rules and regulations of the Patent Office, and on May 16, 1894, the decision of the examiner of interferences was affirmed by them.

That your relator, Alfred L. Bernardin, then appealed from the decision of the examiners-in-chief to the said John S. Seymour, 5 then Commissioner of Patents, according to the statute and the rules and regulations of the Patent Office, and that on March 23, 1895, the said John S. Seymour, then Commissioner of Patents, reversed the decision of the examiners-in-chief and decided that your relator, Alfred L. Bernardin, was the first and original inventor of the said invention and entitled to letters patent for his

invention in accordance with the terms and claims of his application.

That said letters patent would have been issued in accordance with the said finding and decision of said John S. Seymour, then Commissioner of Patents, but for that, under the statute of the United States in such case made and provided, and in accordance therewith the said William H. Northall prosecuted an appeal to the Court of Appeals of the District of Columbia, in which said appeal the testimony taken before the Commissioner, and which was submitted for his consideration, and that alone was or could under the statute properly be filed in said Court of Appeals, and the errors alleged to have been committed by the Commissioner in rendering said decision, which in said petition are called reasons of appeal, were assigned, and the entire record filed as aforesaid with the Court of Appeals of the District of Columbia, and said court entertained and exercised jurisdiction in the matter of said appeal on error.

And subsequently, to wit, on the 12th day of November, 1895, the case was heard upon the record filed as aforesaid, and, upon consideration, the court reversed the findings of the Commissioner, a copy of which said decision is hereto attached and marked
6 "Exhibit A" and made a part hereof for reference; that a certified copy of said decision was filed with the Commissioner of Patents.

And your relator further presents that he, being advised by counsel learned in the law and believing that it was the duty of the said John S. Seymour, then Commissioner of Patents, as a result of his finding and decision that your relator was entitled to have granted and issued to him letters patent for said invention, which decision the said Commissioner never in any way modified or changed, to issue to him said letters, formally tendered to the said Commissioner of Patents the legal fee of twenty dollars, with the request that said letters patent be issued to him, which said request the said John S. Seymour, then Commissioner of Patents, refused; whereupon your relator moved this honorable court for a writ of peremptory mandamus against the said John S. Seymour, then Commissioner of Patents, commanding him to issue said letters patent to your relator in conformity with his said decision, which cause coming on to be heard before his honor Judge McComas, he, on the — day of —, denied the motion; whereupon your relator appealed from the decision of this honorable court to the Court of Appeals, in which said court the case was pending, on the 12th day of April, 1897, when the term of office of the said John S. Seymour as Commissioner of Patents expired, and in consequence thereof the action of your said relator against the said John S. Seymour, Commissioner of Patents, abated.

7 Your relator further shows that on the 12th day of April, A. D. 1897, the Honorable Benjamin Butterworth became Commissioner of Patents in the place and stead of the said John S. Seymour; whereupon your relator, being advised by counsel learned in the law and believing that it was the duty of the said Benjamin

Butterworth, Commissioner of Patents, to issue to your relator letters patent for his said invention, formally tendered to the said Benjamin Butterworth, Commissioner, the legal fee of twenty dollars, with the request that said patent should be issued to him.

And your relator shows that the said Benjamin Butterworth, Commissioner, having examined the case and being familiar with the circumstances thereof, was and is of the opinion that your relator was and is entitled to have and receive letters patent for the said invention, and that the said William H. Northall was not and is not entitled to have issued to him said letters patent as the first inventor; yet, because of the decision of the Court of Appeals rendered in the proceeding as hereinbefore mentioned, deciding that the said Northall was the first inventor, he, the said Commissioner, deemed himself concluded from taking any further or other action than to issue said letters patent to said William H. Northall and refused and still refuses to issue said letters patent to your relator; all of which will more fully appear by a copy of the letter of your relator to the said Benjamin Butterworth, Commissioner of Patents, and by a copy of the letter of the said Benjamin Butterworth, Commissioner of Patents, to your relator, filed herewith and marked Exhibits "B" and "C" and prayed to be taken and read as a part of this motion.

And, further, your relator presents that notwithstanding
8 the act of Congress approved February the 9th, 1893, in form, confers jurisdiction upon the Court of Appeals of the District of Columbia to hear the appeal on error prosecuted from the action of the Commissioner of Patents, an officer of the executive department of the Government, and to review the official action of said officer of the executive department and to revise and reverse or nullify said action; that said statute is to the extent that it attempts to confer jurisdiction upon the Court of Appeals of the District of Columbia to review, reverse, or nullify the action of the executive branch of the Government, unconstitutional, inoperative, and void, and the decision rendered and certified in that behalf is *coram non judice* for want of constitutional authority to entertain, hear, and control by judicial action the official acts of the executive department.

And your relator further presents that the Honorable John S. Seymour, the then Commissioner of Patents, having decided that your relator was entitled to said patent, which said decision the present Commissioner of Patents, the Honorable Benjamin Butterworth, does not in any way impugn, deny, or attempt to overrule, but, on the contrary, announces that he is satisfied of the entire justice of the same and of the right of your relator to have issued to him the patent, as prayed for, but denies, on account of the decision of the Court of Appeals aforesaid, to issue the same to your relator; wherefore your relator shows that it is the duty of the said Benjamin Butterworth, Commissioner of Patents, to grant and issue to your relator letters patent for his said invention.

Wherefore your relator comes and respectfully asks—

That a writ of peremptory mandamus may issue from this
 9 honorable court to the said Benjamin Butterworth, Commissioner of Patents, commanding him to issue said letters patent to your relator in conformity with the decision of the said John S. Seymour, late Commissioner of Patents, and in accordance with the claims of your relator's application, as above stated.

ALFRED L. BERNARDIN.

STATE OF INDIANA,
 County of Vanderburgh, }
 }^{ss:}

Alfred L. Bernardin, being duly sworn, deposes and says that he is the relator named in the foregoing petition; that he has read said petition and knows the contents thereof; that the statements therein contained are true of his own knowledge and belief except as to matters therein stated on information and belief, and as to such matters he believes them to be true.

ALFRED L. BERNARDIN.

Subscribed and sworn to before me this 12th day of April, A. D. 1897.

[L. s.]

PERCY C. HOPKINS,
Notary Public.

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EXHIBIT B.

APRIL 13TH, 1897.

Hon. Benjamin Butterworth, Commissioner of Patents, Washington, D. C.

SIR: On July 21st, 1892, I filed my application in writing in the United States Patent Office—serial No., 440,790—for letters patent for a new and useful improvement in metallic bottle-sealing devices. This application was in due form, as required by statute, and was accompanied by all descriptions, specifications, oaths, drawings, and claims, as required by law and in the form and of the substance required by law. At the same time I paid to the Hon. John S. Seymour, at that time Commissioner of Patents, all fees required by law, upon which Commissioner Seymour caused an examination to be made of my invention as set out in my application, and on October 15, 1892, decided that I was entitled to a patent therefor. On February 10, 1893, my application was withdrawn from issue for the purpose of interference, and on February 24, 1893, an interference was declared with the application of William Painter—serial No., 458,549. On March 31, 1893, William H. Northall filed an application—serial No., 468,524—for letters patent for the same invention, which application was on April 7, 1893, added to the interference between Painter and myself.

The case of this interference duly coming on to be heard the Commissioner of Patents, the Honorable John S. Seymour, on March 23, 1895, decided that I was the first and original inventor of said invention and entitled to letters patent for the same in accordance with the terms and claims of my application.

The letters patent would have issued in accordance with the finding and decision of the said Commissioner of Patents, but for the fact that the said William H. Northall prosecuted an appeal from the decision of the Commissioner of Patents to the Court of Appeals of the District of Columbia, which court on November 12, 1895, rendered a decision, in terms, reversing and overruling the decision of the said Commissioner of Patents, and finding and deciding that the said William H. Northall and not myself was entitled to letters patent for the said invention.

This decision, I present, was and is entirely null and void, and was in no way binding upon the former Commissioner, Mr. Seymour, nor is it binding upon you. The decision is *coram non judice*, the matter not being one properly determinable by the said Court of Appeals on appeal from the Commissioner of Patents, an officer of the executive branch of the Government. The act of Congress in terms conferring upon the Court of Appeals the jurisdiction it has sought to exercise in this case is unconstitutional and void.

11 Believing that the whole proceedings of appeal from the decision of the Commissioner of Patents were void I made demand, accompanied by a tender of the final fee as required by law, upon the said John S. Seymour, the Commissioner of Patents, for letters patent to be issued to me in accordance with his decision that I was entitled to the same, which demand the said Commissioner of Patents refused and so continued to refuse until April 13th, 1897, when his term of office expired and you were inducted in the office of Commissioner of Patents in his place and stead.

I herewith tender to you the sum of twenty dollars, the same being the amount of the final fee required by law, and respectfully request that letters patent be issued to me in accordance with my application heretofore made as above set out and in accordance with the decision of your predecessor in office, the Honorable John S. Seymour, that I was entitled to have issued to me said letters patent.

Very respectfully,

ALFRED L. BERNARDIN,
By JULIAN C. DOWELL,
His Attorney.

(Dictated.)

12 DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., April 16, 1897.

Julian C. Dowell, Esq., attorney-at-law, Loan & Trust building, Washington, D. C.

SIR: I have your letter of April 13, 1897, tendering the final fee and requesting that patent be issued to Alfred L. Bernardin on application filed July 21, 1892, No. 440,790, in accordance with the decision of the Commissioner of Patents, notwithstanding the reversal of that decision by the Court of Appeals of the District of Columbia. Your request cannot be granted, for the reason that

Congress has provided for an appeal from the decision of the Commissioner of Patents to the Court of Appeals, and the court is authorized by statute, in the exercise of that jurisdiction, to revise, modify, reverse, or annul the decision of the Commissioner of Patents in any appealable case.

Until it is settled by proper adjudication that the act conferring such appellate jurisdiction is unconstitutional, the Commissioner will obey the mandate of the Court of Appeals and issue patents in accordance therewith. In this particular case, with which I am thoroughly familiar, the decision of the Commissioner of Patents, my predecessor, was in favor of Bernardin, he having been adjudged to be the sole and first inventor of the device in controversy, and there remained nothing to be done except to issue the patent. An appeal, however, was prosecuted to the Court of Appeals, as hereinbefore stated, and the judgment of the Commissioner was reversed. Thereafter, in order to test the constitutionality of the law and to determine whether jurisdiction could be conferred upon the court to entertain appeals from and on such appeal revise, modify, reverse, or annul the official acts of the Commissioner of Patents, an officer of an executive department of the Government, a petition was filed in the supreme court of the District of Columbia for a writ of mandamus to compel Commissioner Seymour to issue a patent to Bernardin, notwithstanding the decision of the circuit court of appeals. An alternate writ was allowed and proper return made in accordance with the facts. The petition was dismissed, and an appeal was taken to the Court of Appeals of the District of Columbia. The case was heard and, upon consideration, the court sustained the jurisdiction, though entertaining a doubt as to the constitutionality of the law.

It was understood that the case would be taken to the Supreme Court, that the question might be fully and finally determined, but there was not time before the expiration of the term of Commissioner Seymour to do this. That the question should be settled is clear. I will do everything in my power as Commissioner to facilitate this.

If the Court of Appeals can properly exercise jurisdiction to entertain an appeal and revise, modify, or annul an appeal and practically and in effect review on petition in error on the record the official acts of an officer of an executive department, acting within the scope of his departmental jurisdiction, then the patent should not issue to Bernardin. On the other hand, if the law conferring this jurisdiction is, as is contended by you, and as I have urged before I was Commissioner, unconstitutional because it confuses and obliterates the lines which mark the boundary between the several departments of the Government and makes one subordinate to another, then and in that case the patent should issue to Bernardin, as there remains nothing to be done except the administrative act of preparing and issuing the patent. But because of the decision of the Court of Appeals I decline to comply with your request.

I trust if any step is to be taken it may be done immediately, in order that no time be lost in having this question finally settled.

Very respectfully yours,

BENJ. BUTTERWORTH,
Commissioner.

14 In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN }
vs. } At Law. No.
BENJAMIN BUTTERWORTH, Commissioner of Pat- } 40946.
ents.

Upon consideration of the petition for mandamus in the above-entitled cause, it is ordered, on this 20th day of April, A. D. 1897, that the respondent herein show cause, on the 26th day of April, A. D. 1897, at 10 o'clock a. m., before me at the special term of this court, why an alternate writ of mandamus, as prayed for, should not issue, provided a copy of this order and of the petition filed in this cause be served upon the respondent on or before the 21st day of April, A. D. 1897.

L. E. McCOMAS,
Associate Justice Supreme Court of the District of Columbia.

Marshal's Return.

Served copy of within order, also copy of the petition filed in this cause, on within-named respondent April 20, 1897.

ALBERT A. WILSON, *Marshal.*

15 In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN }
v. } Filed April 24, 1897. At Law.
BENJAMIN BUTTERWORTH, Commissioner of Patents, Respondent. } No. 40946.

Answer of Respondent.

The respondent, Benjamin Butterworth, Commissioner of Patents, respectfully makes return to the order of the Honorable L. E. McComas, associate justice of the supreme court of the District of Columbia, made on the 20th day of April, 1897, in the above-entitled matter, to show cause why a writ of mandamus should not issue commanding him to issue letters patent to the relator as prayed for in the petition upon which said order was granted, and says:

That the facts set forth in the relator's petition as to the respondent's refusing to issue a patent to your relator are true.

It is further stated that your respondent based his refusal to grant a patent to Bernardin wholly on the ground that Congress has provided for an appeal from the decision of the Commissioner of Patents

to the Court of Appeals of the District of Columbia, and the court is authorized by said statute, in the exercise of that jurisdiction, to revise, modify, review, or annul the decision of the Commissioner of Patents in any appealable case.

It is further stated that whether or not the act approved February 9, 1893, conferring jurisdiction upon the Court of Appeals of the District of Columbia to hear and decide appeals on error prosecuted from the decisions of the Commissioner of Patents, an officer of the executive department of the Government, is constitutional, the Commissioner is not advised.

It is further stated that if the decision of the Commissioner 16 of Patents, which is that Alfred L. Bernardin, the relator, is the first and original inventor of the invention in controversy and is entitled to receive a patent as prayed for is final, and if, upon such decision, it is the lawful duty of the Commissioner of Patents to accept the final fee and issue a patent to Bernardin as prayed, then the Commissioner of Patents has improperly refused to accept the fee and to prepare said patent for issue; but if the decision of the Commissioner of Patents is subject to revision and reversal on appeal to the Court of Appeals of the District of Columbia, then such refusal on the part of the Commissioner of Patents to accept the final fee and issue the patent to Bernardin, the relator, is right and proper.

Your respondent states that it — his desire to have the jurisdiction of the Court of Appeals of the District of Columbia speedily and finally determined for the future guidance of the Patent Office and in the interests of the applicants appearing before it.

And, having fully answered, he prays judgment.

BENJ. BUTTERWORTH,

Commissioner.

April 23, 1897.

17 In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN } vs.

BENJAMIN BUTTERWORTH, Commissioner of Pat- } At Law. No.
ents. } 40946.

This cause coming on to be heard upon the relator's petition for a writ of mandamus against the respondent and counsel having been heard thereon, it is thereupon, on due consideration thereof, this 26th day of April, 1897, by the court ordered and adjudged that the rule to show cause is hereby discharged and the petition be, and the same is hereby, dismissed at the costs of relator.

Petitioner in this cause having prayed an appeal to the Court of Appeals of the District of Columbia from the judgment of this court dismissing the petition, the same is allowed and bond is fixed in the penalty of two hundred dollars.

L. E. MCCOMAS,
Asso. Justice.

18 In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN }
 vs. } At Law. No.
 BENJAMIN BUTTERWORTH, Commissioner of Pat- } 40946.
 ents.

In accordance with the consent of counsel on both sides and upon motion of relator's attorney in the above-entitled case, leave is hereby given the relator to file a transcript of the record of the case of United States *ex rel.* Alfred L. Bernardin *vs.* John S. Seymour, Commissioner of Patents, No. 40029, and to use the exhibits in the said transcript as exhibits in this case.

L. E. McCOMAS,
Asso. Justice.

19 In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BER- }
 NARDIN } Filed April 28, 1897.
 vs. } At Law. No. 40946.
 BENJAMIN BUTTERWORTH, Commissioner of }
 Patents.

The clerk will please note an appeal in the above-entitled cause to the Court of Appeals of the District of Columbia from the order of the court entered April 26, 1897, dismissing the petition for mandamus and issue citation to the appellee.

JULIAN C. DOWELL,
Att'y for Alfred L. Bernardin.

April 27, 1897.

[Endorsed:] At law. No. 40946. In the supreme court of the District of Columbia. United States *ex rel.* Alfred L. Bernardin *vs.* Benjamin Butterworth, Commissioner of Patents.

20 In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BER- }
 NARDIN } Filed April 28, 1897.
 vs. } At Law. No. 40946.
 BENJAMIN BUTTERWORTH, Commissioner of }
 Patents.

It is hereby stipulated and agreed by and between counsel for the parties that a transcript of the record of the case of United States *ex rel.* Alfred L. Bernardin *vs.* John S. Seymour, Commissioner of Patents, No. 40029, may be filed and used as a part of the record in this case and that the exhibits in said transcript may be used as exhibits in this case, and issue and citation are hereby waived.

JULIAN C. DOWELL,
Att'y for Alfred L. Bernardin.
 W. A. MEGRATH,
Att'y for Comm'r of Patents.

April 26, 1897.

12 THE UNITED STATES EX REL. ALFRED L. BERNARDIN VS.

[Endorsed:] At law. No. 40946. In the supreme court of the District of Columbia. United States *ex rel.* Alfred L. Bernardin *vs.* Benjamin Butterworth, Commissioner of Patents. Stipulation.

21 Memorandum.

Apr. 30, '97.—Appeal bond filed.

22 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, {
District of Columbia, }^{ss:}

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 21, inclusive, are true copies of originals in cause No. 40946, at law, wherein United States *ex rel.* Alfred L. Bernardin is plaintiff and Benjamin Butterworth, Commissioner of Patents, is defendant, as the same remains upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 3rd day of May, A. D. 1897.

JOHN R. YOUNG, Clerk.

23 Transcript of Record.

Court of Appeals, District of Columbia, October Term, 1896.

THE UNITED STATES ex Rel. ALFRED L. BERNARDIN, Appellant, {
vs.
JOHN S. SEYMOUR, Commissioner of Patents.}
No. 603. No. 7, Special Calendar.

Appeal from the supreme court of the District of Columbia.

Filed July 22, 1896.

24 In the Court of Appeals of the District of Columbia.

THE UNITED STATES ex Rel. ALFRED L. BERNARDIN, Appellant, {
vs.
JOHN S. SEYMOUR, Commissioner of Patents.}
No. 603.

Supreme Court of the District of Columbia.

UNITED STATES ex Rel. ALFRED L. BERNARDIN {
vs.
JOHN S. SEYMOUR, Commissioner of Patents.}
At Law. No. 40029.

UNITED STATES OF AMERICA, {
District of Columbia, }^{ss:}

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times

hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition for Mandamus & Exhibit "A."

Filed June 15, 1896.

In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN }
vs. } At Law. 40029.
JOHN S. SEYMOUR, Commissioner of Patents. }

Motion for mandamus.

The relator, Alfred L. Bernardin, says he is a citizen of the United States and residing in Evansville, Indiana, and that during the latter part of February, 1892, to wit, about the 25th day of February, he invented a new and useful improvement in metallic bottle-sealing devices, which was not known or used by others in this country, nor patented nor described in any printed publication in this or any foreign country before his invention or discovery thereof, nor in public use or on sale for more than two years prior to his application; that upon July 21, 1892, he filed his application—serial No., 440,790—in the U. S. Patent Office for letters patent for the aforesaid device, of which your relator believes himself to be the first and original inventor; that the said application was made in writing in due form as required by statute in every particular, and that your relator, Alfred L. Bernardin, filed therewith in the Patent

Office of the United States a certain written description of
25 the same and the manner of making and using it in such
full, clear, concise, and exact terms as to enable any person
skilled in the art or science to which it appertains or with which it
is most nearly connected to make, construct, and use the same, and
did explain the principle thereof and the best mode in which he
has contemplated applying that principle so as to distinguish it
from all other inventions, and did particularly point out and
distinctly claim the particular improvement and combination which
he claims as his invention, as follows:

1st. A metallic bottle-sealing cap having its lower edge adapted
to be pressed into contact with a locking shoulder, and provided
above the said edge with a circumferential outwardly projecting
rib or bead for engagement by the removing tool.

2nd. The improved bottle-sealing cap herein described, provided
on its depending flange with an outwardly projecting rib or bead,
having its sections 1 and 2 approximately flat, whereby to afford a
firm bearing for engagement by the removing tool, and having said
sections joined at their outer edges by an acute bend, whereby such
joint and the proximity of the sections 1 and 2 of the bead will tend
to strengthen and give rigidity to said bead.

3rd. The combination substantially as described of the bottle
having its neck provided with a locking shoulder, and the cap fitted

on said bottle, pressed into continuous contact with the locking shoulder, and provided with a circumferential outwardly projected bead arranged for engagement by the removing tool.

4th. The improvement in bottle closures substantially as herein described and shown, consisting of the bottle provided near its lip with a locking shoulder, the cap fitted on said bottle and having its lower edge pressed into continuous contact with the locking shoulder, and provided above said contact with an outwardly projecting bead, having flat sections 1 and 2, and arranged for engagement by the removing tool.

5th. The combination substantially as herein described of the bottle provided with a locking shoulder, the cap fitted to said bottle and having the lower edge of its depending flange pressed into contact with the locking shoulder and provided above said lower edge with an outwardly projected portion, having its upper side arranged below the *the top* of the cap and adopted to form a bearing for engagement by the cap-removing tool.

6th. The metallic bottle-sealing cap having its lower edge adapted to be pressed into contact with a locking shoulder and provided above the said edge with a circumferential outwardly projecting rib or bead for engagement by the removing tool, said rib or bead having its upper side arranged below the plane of the top of the cap.

That said specification and claims were duly signed by your relator, Alfred L. Bernardin, as such inventor, and were duly attested by two witnesses.

That your relator, Alfred L. Bernardin, did further furnish 26 drawings of the said invention, signed by the attorneys of your relator, Alfred L. Bernardin, and attested by two witnesses.

That your relator, Alfred L. Bernardin, did further make oath that he verily believed himself to be the original and first and sole inventor and discoverer of the same, for which he solicited a patent; that he did not know and did not believe that the same was ever before known or used, and did state the country whereof he was a citizen.

That your relator, Alfred L. Bernardin, did further at the time of making such application pay to the said Commissioner of Patents all fees required by law.

That upon the filing of such application and the payment of the fees required therefor by law the said Commissioner of Patents did cause an examination to be made of the new invention set forth, contained, and described in said application, description, and drawings; that upon the said examination it was the opinion of the Commissioner of Patents that the invention was new and useful; that your relator was the first and original inventor, and that your relator was entitled to letters patent for his invention, and thereupon, on October 15, 1892, his application was allowed.

That on or about February 10, 1893, this application was withdrawn from issue for the purpose of interference, and on February 24th, 1893, upon due proceedings and interference was declared with the application of William Painter—serial No., 458,549—filed

January 16, 1893; that on March 31st, 1893, William H. Northall filed an application—serial No., 468,524—for letters patent for the same invention, which application was on April 7, 1893, added to said interference between Bernardin and Painter; that the case of this interference duly coming on to be heard before the examiner of interferences according to statute, rules, and regulations of the Patent Office in that case made and provided, upon the respective statements, testimony, and proofs of your relator said Northall and said Painter prepared and presented according to the rules and regulations of the Patent Office, the examiner of interferences did decide that said William H. Northall was the original and first inventor of the said improvement in bottle-sealing devices, and that he was entitled to letters patent therefor.

That your relator, Alfred L. Bernardin, then appealed from this decision to the examiners-in-chief, according to the provisions of the statute and the rules and regulations of the Patent Office, and on May 16, 1894, the decision of the examiner of interferences was affirmed by them.

That your relator, Alfred L. Bernardin, then appealed from the decision of the examiners-in-chief to the Commissioner of Patents according to the statute and the rules and regulations of the Patent Office, and that on March 23, 1895, the Commissioner of Patents reversed the decision of the examiners-in-chief and decided that your relator, Alfred L. Bernardin, was the first and original inventor of the said invention, and entitled to letters patent for his invention in accordance with the terms and claims of his application.

27 That said letters patent would have been issued in accordance with the said finding and decision of said Commissioner of Patents but for that, under the statute of the United States in such case made and provided and in accordance therewith, the said William H. Northall prosecuted an appeal to the Court of Appeals of the District of Columbia, in which said appeal the testimony taken before the Commissioner and which was submitted for his consideration, and that alone, was or could under the statute properly be filed in said Court of Appeals, and the errors alleged to have been committed by the Commissioner in rendering said decision, which in said petition are called reasons of appeal, were assigned and the entire record filed as aforesaid with the Court of Appeals of the District of Columbia, and said court entertained and exercised jurisdiction in the matter of said appeal on error.

And subsequently, to wit, on the 12th day of November, 1895, the case was heard upon the record filed as aforesaid, and upon consideration the court reversed the findings of the Commissioner, a copy of which said decision is hereto attached and marked "Exhibit A" and made a part hereof for reference; that a certified copy of said decision was filed with the Commissioner of Patents.

And your relator further presents that being advised by counsel learned in the law and believing that it was the duty of the Commissioner, as a result of his finding and decision, that your relator was and is entitled to have granted and issued to him letters patent

for said invention, and which said opinion and decision he has in nowise changed or modified, that it was and is his duty, in conformity with said decision--he, the said Commissioner, not desiring to inquire further, but being satisfied that your relator is entitled to have said patent issued to him--to issue said letters patent to your relator.

And further your relator presents that notwithstanding the act of Congress approved February 9th, 1893, in form confers jurisdiction upon the Court of Appeals for the District of Columbia to hear the appeal on error prosecuted from the action of the Commissioner of Patents, an officer of the executive department of the Government, and to review the official action of said officer of the executive department and to revise and reverse or nullify said action, that said statute is to the extent that it attempts to confer jurisdiction upon the Court of Appeals of the District of Columbia to review, reverse, or nullify the action of the executive branch of the Government unconstitutional, inoperative, and void, and the decision rendered and certified in that behalf is *coram non judice* for want of constitutional authority to entertain, hear, and control by judicial action the official acts of the executive department.

And your relator further presents that the honorable Commissioner of Patents having decided that your relator is entitled to said patent, and when said Commissioner would have issued said patent to your relator, but for the decision aforesaid of the said Court of Appeals for the District of Columbia, your relator formally

28 tendered the final fee due to the Government upon the allowance of the application for a patent upon the decision of said Commissioner that your relator was and is entitled to have and receive said patent, and the honorable Commissioner being fully satisfied in that behalf, and having so found and adjudged and not desiring to make further inquiry in any behalf, your relator did tender the legal fee of \$20, with the request that said patent should be issued to him; and thereupon said Commissioner, although he had in nowise changed his mind, and although he had decided and had in nowise changed his mind, that the said William H. Northall was not entitled to have or receive a patent and was not the first inventor, yet because of the decision of the Court of Appeals for the District of Columbia rendered in the proceeding in error as hereinbefore mentioned, he deemed himself concluded from taking any further or other action than to issue said patent to said William H. Northall, and for that reason only he refused to issue said patent to your relator.

Wherefore your relator comes and respectfully asks—

That a writ of peremptory mandamus may issue from this honorable court to the said Commissioner of Patents, commanding him to issue said letters patent to your relator in conformity with his said decision and in accordance with the claims of your relator's application as above stated.

ALFRED L. BERNARDIN.

STATE OF INDIANA, } ss:
County of Vanderburgh,

Alfred L. Bernardin, being duly sworn, deposes and says that he is the relator named in the foregoing petition; that he has read said petition and knows the contents thereof; that the statements therein contained are true of his own knowledge and belief, except as to those matters therein stated on information and belief, and as to such matters he believes them to be true.

ALFRED L. BERNARDIN.

Subscribed and sworn to before me this 11th day of June, A. D. 1896.

[SEAL.]

H. I. BENNETT,
Notary Public, D. C.

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"EXHIBIT A."

Filed June 15, 1896.

In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN }
vs. } At Law.
JOHN S. SEYMOUR, Commissioner of Patents.

This is an appeal from the decision of the Commissioner of Patents in an interference proceeding involving the following issue:

"A metallic bottle-sealing cap having its lower edge adapted to be pressed into contact with a locking shoulder, and provided above the said edge with a circumferential, outwardly projecting rib or bead for engagement by the removing tool."

There were three parties to the original proceeding, Alfred L. Bernardin, William H. Northall, and William Painter.

The primary examiner awarded priority of invention to Northall and upon appeal to the examiners-in-chief the decision was affirmed. The appeal was then taken to the Commissioner, who reversed the examiners and awarded priority to Bernardin. Northall alone has appealed from that decision, and the claim of Painter is therefore no longer matter of consideration.

Applications for patents were filed by the parties in the following order of time: Bernardin, July 21, 1892; Painter, January 16, 1893; Northall, March 31, 1893.

The record contains a great mass of conflicting evidence, from which we are to determine who is entitled to priority, or rather, as between the two parties left to the controversy, who is the inventor, for one thing which is very plain from the record is that, as between Bernardin and Northall, this is not a case of two independent inventors who, working in ignorance of each other's discoveries, have exploited the same idea.

Bernardin claims to have conceived the idea in February, 1892. He was then and had for some years been the president of the Bernardin Bottle Cap Co.

In and before 1891 this corporation, whose place of business was Evansville, Indiana, had been engaged in the manufacture of bottle sealing devices, the leading one of which consisted of a tin cap for the mouth of the bottle, with a collar which fastened about its neck and was connected by strips with the cap. In February, 1892, Bernardin learned of a cap manufactured in Baltimore that was made in a single piece and was much simpler than the one made by his company.

This was made to press down about the shoulder or rim of the bottle neck and its edges were corrugated so as to make a projecting edge or flange for its easy removal.

This discovery alarmed Bernardin, and he began to consider improvements that might be made in such devices. There is no doubt

that he considered two of these seriously and went to Washington to apply for patents about April 16, 1892. One was 30 a cap with corrugated edges, which were to fit similar corrugations in a bottle made for the purpose, and the other was made with perforations in which a tool could be inserted for removal. He was informed by his attorneys that these devices were probably not patentable. They were also expensive to make and did not sufficiently overcome the difficulty of removal. He was very much discouraged and returned home. The great object in view was a cap, inexpensive to make, that would be a perfect seal and at the same time easily removable without injury to the bottle.

Bernardin claims that he had also conceived the idea of the cap in issue, with the bead or rim at the top, in February, 1892, and had discussed it, as well as the others, with Northall, who was the superintendent of the machine shop of the bottle cap company. He says that he made a rough sketch of the one with the bead, and that Northall preferred it to the others, but he (Bernardin) thought it would be too expensive to make. When he returned discouraged the matter was taken up again, and he suggested to Northall a simpler way of pressing on the bead or rim and directed him to make tools for the experiment. Proving satisfactory, he had some of the caps made and went to Washington in July, 1892, and filed his application for a patent.

Northall was a skilled mechanic and had been in the service of the bottle cap company for about eight years.

He claims that the idea of making a cap with a bead was suggested to him by the rim found on metallic cartridges and was matured on December 19, 1891, on which day he made a drawing of the same, with a tool to be used in removing it, and disclosed it to a number of persons.

He admits that he knew of the two devices of Bernardin before referred to and of his trip to Washington concerning patents for them, and says that before Bernardin's return he, having no confidence in the efficacy of those inventions, mentioned his own invention of the cap in issue to a fellow-workman and to the treasurer of the Bernardin Company. These persons say that he did so, but that he referred to his invention as having been made the night before. He also says that he showed his drawing to Bernardin on

his return, who was pleased with it and ordered the caps to be made and tested, but afterwards informed him it was not patentable. In part explanation of his conduct in taking no steps himself to apply for a patent, he claims to have been too poor to undertake it and to have been willing for the Bernardin Company to do so, expecting, however, to have an interest in it. He says that he was dependent upon his position with the company, which paid him \$100 per month, and let the matter proceed until some time in August, 1892, when he saw from copies of papers in the Patent Office, shown him by Bernardin, that the application was made in the latter's name. He undertakes to explain his subsequent inaction by the fear he had of losing his place, by his ignorance of the law in such matters, which caused him to think that he was too late, and
31 to some slight extent by hopes that he would be given an interest in the new corporation forming and formed to exploit the invention.

There are, too, some other circumstances growing out of his connection with the Crown Cork and Seal Co. of Baltimore, assignee of Painter, and also holder of an option upon his (Northall's) claim herein, in the event of his success, that tend in some degree to affect the integrity of his claim.

On the other hand, Bernardin's conduct is surrounded by some circumstances that tend to impair the strength and weight of his claim, notwithstanding the diligence with which he has prosecuted it since April, 1892.

According to his own statement he made no disclosure of his invention of the disputed cap to any one except Northall until his return from Washington, about the last of April, 1892. It seems clear that he did not mention it to his Washington attorneys, Munn & Co., when they discouraged him as regards the patentability of the first two devices on which he filed applications. He has produced no sketch or drawing made prior to the application for patent.

He undertakes to account for the neglect of this invention by saying that he had deemed it impracticable because of the difficulty and expense that he apprehended in making the bead or rim.

There is an irreconcilable conflict between the statements of Bernardin on one side and Northall on the other. Fortunately it is not necessary to analyze these, weighing circumstance against circumstance and setting off inference against inference, in order to determine which of them is most entitled to belief.

In our opinion the case must turn upon the truth of falsity of Northall's statement that he made the drawing, which fully discloses this invention, on December 19, 1891.

If he made the drawing on that date he is the inventor. He has produced a piece of paper with the drawing on it, with that date written upon it with a pencil.

He says that, having been at work on the invention for some time, he completed his plan and made the drawing on that day, which was Saturday; that he went to the saloon of Frank Haas after supper and engaged with several acquaintances in a game of cards,

as he had often done before; that he lost each game and his companions began to make sport of him, saying that he had lost his skill through having neglected the game so long; that he said he had been working at a thing that would make him rich, and asked for a piece of paper to show them what he had been doing while absent. There was no paper, but some one handed him a cardboard "oyster sign" which Haas had over his lunch counter, and, turning it over, he made a rough sketch on the back of his bottle cap and tool for removing it.

This statement is corroborated by Frank Haas, the saloon-keeper; McDowell and Ziegler, draymen; Heidt, a school janitor; Oslage, a grocer, and Wagner, a horseshoer, who were all present. These witnesses are all positive that it occurred on Saturday night before

Christmas, December 19, 1891, and account reasonably for
32 their ability to fix the precise date. Haas said that he put the sign away at the end of the oyster season and found and produced it after the controversy arose.

These witnesses appear to be intelligent laboring and business men and to have no pecuniary interest in the result of the controversy. They had lived long in Evansville, were well known, and no witness was offered to impeach their credibility.

They have either spoken the truth or been guilty of wilful falsehood; there is no room for mistake.

Again, Northall is corroborated by two other intelligent, disinterested, and apparently truthful witnesses. Henry B. Polsdorfer, who is a manufacturer of washboards, woodenware, etc., and a trained mechanic, says that he knew Northall well, and that they and their wives were intimate friends. Being interested in machinery and inventions, he frequently conversed with Northall upon such subjects.

He says that Northall showed him his drawing of the bottle cap in issue at his house, in Evansville, and explained it fully "between the middle and latter part of December, 1891." He recognized the drawing when produced, and remembered that it had December on it, but did not remember the day of that month. Mary E. Polsdorfer testified to hearing the conversation and seeing the drawing also. She remembered that it was just before Christmas, because she had gone to Mrs. Northall's to join her in making some slipper cases for presents and her husband had gone with her. We find no reasonable ground for supposing that any of the foregoing witnesses have confounded the Christmas of 1892 with that of 1891, as suggested.

The only direct attempt to break the force of all this corroborating evidence is by the charge that the date of this important drawing has been changed. It is charged that the date as it now appears has been written over an erasure, and both the original and an enlarged photographic copy have been offered for inspection in support of the charge.

If it could be shown that this date has been tampered with, the fact would discredit Northall's whole case, and for that reason and because the decision of the Commissioner is founded largely in that belief we have given the original and copy as close and carefully

scrutiny as possible with the aid of simple microscopes of considerable magnifying power.

No witnesses were called to inspect the writing and testify as to the results of the observation.

With the greatest distrust of our own capacity in the matter, we are, nevertheless, compelled to rely upon our own inspection and to form our own opinion unaided.

That the drawing and the date both may have been traced over erasures of other things is not at all improbable. There was some conflict between Bernardin and Northall in regard to the time and place that the drawing paper itself had been obtained. Northall testified, without reference to this charge, which had not then been made or intimated, that the drawing was made on a piece cut from a sheet of old paper that he had brought with him to Evans-

33 ville from his eastern home and had sketches on it which he "rubbed out" before putting this one on.

A pencil-mark is pointed out just beneath (that is, a little lower down the page) a letter in the word December, which the Commissioner thought was "the lower loop of a letter." This loop is plainly visible to the naked eye; in fact, it appears even fresher than the writing above it and shows no sign of attempt at erasure. If it be part of an erasure made for the purpose of falsifying the date, it seems strange that it should have been left when such great care was had in the complete erasure of the remainder.

Conjecture founded on a circumstance of that kind is not sufficient to discredit the testimony of positive witnesses.

Our attention was called, on the argument, to another alleged indication of fraudulent alteration of the date which seems not to have been suggested to the examiners or the Commissioner. It is claimed that the photographic copy discloses the figure 3 in proximity to the 1 in 1891 of the date. Our conclusion is, after examination, that this also is a mistaken conjecture. What would be the result, however, if it be conceded that there is the tracing of the figure 3 as claimed? The conjecture that the original date was 1893 instead of 1891 is inconsistent with all the established facts of the case and unreasonable in any view that may be taken of Northall's conduct.

If Northall did not invent the cap as claimed, he must have conceived the idea of claiming Bernardin's invention as his own as early as April, 1892. The caps were first made soon after that date, and Northall had notice of Bernardin's application for the patent as early as the summer of 1892. The invention was subject of local newspaper comment in September, 1892.

Now, if he prepared the drawing as part of his plan to defraud Bernardin, he surely would not have given it a date in the year 1893 or any other later than February, 1892, when, according to Bernardin, the knowledge of the invention was first communicated to him. Preparing it to antedate Bernardin, he would naturally have assigned his pretended invention to the year 1891. A change in the month of that year might have become important, but not so with the year.

After much consideration we can come to no other conclusion than that the appellant Northall is entitled to priority.

The decision appealed from will therefore be reversed and the proceedings and decision certified to the Commissioner of the Patent Office as provided by law. It is so ordered.

(Signed)

SETH SHEPARD,

Associate Justice.

Answer to Petition for Writ of Mandamus.

Filed June 25, 1896.

U. S. Patent Office.

In the Supreme Court of the District of Columbia.

U. S. ex Rel. ALFRED L. BERNARDIN }

v.

JOHN S. SEYMOUR, Commissioner of Patents, } At Law. No. 40029,
Respondent. }

Answer for respondent.

And now comes S. T. Fisher, acting Commissioner of Patents, and makes return officially to the order of the Honorable Louis E. McComas, justice of the supreme court of the District of Columbia, made on the 11th day of June, 1896, in the above-entitled action against John S. Seymour, Commissioner of Patents, to show cause why a writ of mandamus shall not issue, commanding the said John S. Seymour, Commissioner of Patents, to issue letters patent to the relator, as prayed for in the petition upon which said order was granted, and says—

That it is true, as stated by the petition, that the relator did file in the U. S. Patent Office on July 21, 1892, an application for a patent—serial No. 440,790—for improvement in metal bottle-sealing devices; that after examination the relator was adjudged entitled to letters patent for his invention, and his application was allowed and passed to issue October 15, 1892; that on February 10, 1893, said application was withdrawn from issue, and on February 24, 1893, an interference was declared with an application of one William Painter; that on March 31, 1893, William H. Northall filed an application—serial No. 468,524—for letters patent for the same invention, which application was added to the interference between Bernardin and Painter; that this interference was duly tried before the examiner of interferences, as provided by the statutes and the rules of practice of the Patent Office; that the examiner of interferences decided that the said William H. Northall was the original and first inventor of the improvement in controversy, and that the said Northall was entitled to a patent; that the relator then appealed to the examiners-in-chief of the Patent Office, and that the decision of the examiner of interferences was affirmed by them; that the relator then appealed to the Commissioner of

Patents, who, on March 23, 1895, reversed the decision of the examiners-in-chief and decided that Alfred L. Bernardin was the first and original inventor of the invention in controversy and was entitled to letters patent therefor, as appears by the copy of the decision annexed and marked "A."

It is further stated that it is true that on April 9, 1895, the said William H. Northall prosecuted an appeal to the Court of Appeals of the District of Columbia, according to the provisions of the acts

approved February 9, 1893, and July 30, 1894, and the rules
35 and regulations of said court; a copy of this appeal is annexed and marked "B;" that after the appeal was duly heard by the Court of Appeals the said court found that the said William H. Northall was the first and original inventor of the improvement in controversy, and by the decision dated January 6, 1896, reversed the decision of the Commissioner of Patents; that a certified copy of said decision of the said court was filed with the Commissioner of Patents, a copy of which decision is annexed and marked "C."

It is further stated that on January 22, 1896, Alfred L. Bernardin, the relator, did make a motion before the Commissioner of Patents to reopen the case for the admission of newly discovered evidence, as shown by a copy of said motion hereto attached and marked "D;" that on May 25, 1896, the Commissioner of Patents rendered a decision denying said motion; a copy of this decision is attached to this answer and marked "E."

It is further stated that on May 28, 1896, Alfred L. Bernardin, the relator, filed in the Patent Office a motion to stay the issue of a patent to Northall, pending proceedings by bill in equity to be filed in the circuit court of the United States for the district of Indiana; that a copy of this motion is attached and marked "F;" that this motion was heard by the acting Commissioner of Patents, and that the said acting Commissioner rendered a decision on June 12, 1896, denying said motion; a copy of this decision is attached to this answer and marked "G."

It is further stated that on May 28, 1896, the relator, as authorized by section 4915 of the Revised Statutes, filed in the circuit court of the United States for the district of Indiana a bill in equity against William H. Northall and John S. Seymour, Commissioner of Patents, to authorize the Commissioner to issue a patent to Alfred L. Bernardin, and that a copy of this bill is hereto attached and marked "H."

It is further stated that it is true that on June 11, 1896, the relator did tender the final Government fee of twenty dollars, with a request that said patent should issue to him, as shown by a copy of the request annexed and marked "I;" that the acting Commissioner of Patents did, on June 15, 1896, refuse the tender of the fee and did deny the request to issue the patent to the relator, as shown by the annexed copy of the decision, marked "J."

It is further stated that the decision of the Commissioner of Patents on the question of priority has not been reversed by him or any one acting for him; that the acting Commissioner refused the

fee and refused to issue the patent to the relator, not because he desired to make inquiry as to whether Alfred L. Bernardin is entitled to a patent or to be advised in that matter, but that he based his refusal to accept the fee and issue the patent, and does so still, solely upon the ground that the Court of Appeals of the District of Columbia has entertained the appeal taken to it from the decision of the Commissioner of Patents and found that William H. Northall was the first and original inventor and had entered a decision reversing the decision of the Commissioner of Patents in favor of Bernardin.

36 It is further stated that whether or not the act approved February 9, 1893, conferring jurisdiction upon the Court of Appeals of the District of Columbia to hear and decide appeals on error prosecuted from the decisions of the Commissioner of Patents, an officer of the executive department of the Government, is constitutional, the Commissioner or acting Commissioner is not advised.

It is further stated that if the decision of the Commissioner of Patents, which is that Alfred L. Bernardin, the relator, is the first and original inventor of the invention in controversy and is entitled to receive a patent as prayed for, is final, and if upon such decision it is the lawful duty of the Commissioner or the acting Commissioner of Patents to accept the final fee and issue a patent to Bernardin as prayed, then the acting Commissioner of Patents has improperly refused to accept the fee and to prepare said patent for issue, but if the decision of the Commissioner of Patents is subject to revision and reversal on appeal to the Court of Appeals of the District of Columbia, then such refusal on the part of the acting Commissioner of Patents to accept the final fee and issue the patent to Bernardin, the relator, is right and proper.

And, having fully answered, he prays judgment.

S. T. FISHER,
Acting Commissioner of Patents.

W. A. MAGRATH, *Of Counsel.*

EXHIBIT "A."

Filed June 25, 1896.

No. 15992.

U. S. Patent Office.

M. H.

NORTHELL
v.
PAINTER
v.
BERNARDIN.

Bottle-sealing Device.

Appeal from examiners-in-chief.

Application of Wm. H. Northall filed March 31, 1893, No. 468,524.

Application of Wm. Painter filed January 16, 1893, No. 458,549.

Application of Alfred L. Bernardin filed July 21, 1892, No. 440,790.

Mr. Wm. H. Gudgel for Northall.

Mr. Wm. C. Wood for Painter.

Messrs. Butterworth & Dowell for Bernardin.

In this case Painter and Bernardin appeal from the decision of the examiners-in-chief awarding priority of invention to Northall on the following issue:

"A metallic bottle-sealing cap, having its lower edge adapted to be pressed into contact with a locking shoulder, and provided above the said edge with a circumferential outwardly projecting rib or head for engagement by the removing tool."

37 In 1891 the Bernardin Bottle Cap Company was engaged in the manufacture of bottle-sealing devices of tin, differing from that of this issue, one form consisting of a collar about the neck of the bottle and a tin cap covering the top, the tin top and the collar being connected by tin strips. Bernardin was the principle owner and managing officer of the company, and Northall was foreman of the tool-room and worked under Bernardin's direction.

Painter has no connection with this company, but was connected with the Crown Cork & Seal Company of Baltimore, Maryland. In the view I take of this case he cannot prevail, by reason of his delays and inactivity for a year, between his alleged conception and his application, and his appeal is therefore dismissed.

The cap which the Bernardin Company was then manufacturing was unsatisfactory, and in the latter part of February Bernardin learned that a better and simpler device had been put on the market by the Crown Cork & Seal Company. This was regarded as a matter of great business consequence to the Bernardin Company. Early in the year the company talked about going into the tinware business, and Charles Hart, of Brooklyn, was engaged to inform the company what kind of presses and tools were required for that purpose. Northall thought that this might lead to his separation from

the company, for he knew little about the tinware business, and the new Baltimore device tended to the same thing.

Bernardin at that time was closely considering a corrugated bottle head and also a perforated bottle cap, and on April 16, 1892, he filed an application in the Patent Office covering such a device of his own invention. On that day he was in Washington upon the business of his application. While there he ascertained from his attorneys that the application for the corrugated bottle head and for the perforated cap was not allowable. Moreover, it was too hard to get the bottle cap off and too expensive to make. He was very much discouraged. Upon his return to Evansville it became apparent that a new and better cap would have to be found or the bottle-sealing business of the company would have to be abandoned.

Soon afterward the construction of the bottle cap, which is the subject-matter of this interference, was begun by the Bernardin Company, and the question is whether Bernardin or Northall originated it. The facts derived from undisputed testimony will be considered first. After a conference between Bernardin and Northall, Bernardin directed Northall to make a roll and a tool for beading the caps, and this Northall did. About April 25, 1892, a few caps were made with these tools, a specimen like those of the first lot being Northall's Exhibit No. 7, and this cap embodies the issue and is a full reduction to practice, which inures to the benefit of Bernardin or Northall according as the question of originality is decided for the one or the other. Northall made the tools under the direction of Bernardin in the same manner as he made other tools

under Bernardin's direction, without any suggestion from
38 Northall that the tools would be the means for manufacturing

an article which the company would not have the right to make, or that the bottle cap when made would embody the invention of Northall.

In the latter part of April, 1892, some of the new caps were made by the use of the arbor and grooved wheel, Bernardin's Exhibits 8 and 11, with no arrangement suggested by either Northall or Bernardin that the invention so reduced to practice was one for which the company would be obliged to treat with one of its subordinates. Better tools, the combination die for pressing the bead on the caps, another method of manufacture, were made by Bernardin's direction, still without any treaty as to the right to make the article. Soon afterward Northall came to understand that Bernardin was preparing to apply for a patent upon this invention.

On July 21, 1892, Bernardin was in Washington again and there made application for a patent upon this article as an invention of his own. In August he received papers from his attorneys in Washington concerning his application in the Patent Office, including a black-print copy of his drawings, showing Bernardin's name signed as inventor, and these he showed to Northall. In October he received a letter from his attorneys in Washington, stating that his application had been allowed. This Northall saw.

In February, 1893, Northall, for the first time, consulted an at-

torney about his interests. In the same month his counsel opened correspondence with the attorney for the Crown Cork & Seal Company and indirectly with Painter.

Between the first and fourth of March, 1893, Bernardin was informed that an interference had been declared between himself and Painter, and on the tenth of March this was mentioned by Bernardin to Northall.

March 17, 1893, Bernardin, Haas, and others formed a company for exploiting the new invention. Soon afterward Bernardin learned that Northall was in correspondence, through attorneys, with his opponent, Painter. On March 29, 1893, Bernardin discharged Northall, stating to him that it was for that reason. On the same day Northall and his attorney started for Washington and immediately prepared and filed in the Patent Office his application.

From these undisputed facts I am strongly impelled toward the conclusion that Bernardin is the real inventor, because it is difficult to believe that events progressed, under the daily observation of Northall, to the point of commercial manufacture of this article in a factory in which Northall had no proprietary interest without an attempt at least to exact an agreement giving him recompense if he so much as thought himself the inventor and without an attempt to apply for a patent in his own name.

It is now necessary to weigh the conflicting testimony, and first on the question whether Northall ever said to Bernardin, "I ought to get a patent on this." I doubt it. Had he said so much he would have said more or done more. That did not protect his supposed rights nor meet the exigency of another manufacturing the device before his eyes, as though it were not his. My conclusion is that at no prior time to his discharge did Northall make to Bernardin any claim to — the originator of this invention.

Northall claims that he has shown that he was in possession of the mental conception of this device as early as December 19, 1891, and that on that day he made two sketches of the device, one upon drawing paper at his house, Northall's Exhibit No. 1, and the other upon a card-board oyster sign in Haas's saloon that evening. Exhibit No. 1 is dated December 19, 1891. Since throughout the period from December to April the bottle-sealing branch of the Bernardin Company's business was at a crisis in its affairs by reason of the impending competition of the company in Baltimore with a superior cap, as they believed, it is a striking circumstance, if true, that Northall was in possession of the complete remedy. The evidence upon this point is challenged, and accordingly it has been closely scrutinized. The drawings were made at some time and one of them was exhibited on some occasion in Haas's saloon. Northall, McDowell, Frank Haas, Oslage, Heidt, Zeigler, and Wagner all saw it at one time, and that in Haas's saloon. But at what time? Singularly enough, each remembers that it was on the 19th of December, 1891; McDowell because he had a dispute with Haas and for a time did not go there; Frank Haas because he attended a funeral the next day; Oslage because Haas said he was going to

a funeral the next day; Heidt because it was the Saturday before Christmas; Zeigler states it to be just before Christmas, 1891, but does not show how he fixes the date, and Wagner does not state how he fixes the time. It appears that all of these persons were at this saloon on other Saturday nights before and after this occasion, and the particular meeting at which Northall drew the sketch is not connected with any event the date of which is fixed by anything more than arbitrary association of ideas. At best it is entitled to but little weight.

It is indisputable that the first caps were made in the latter part of April, 1892. The caps were not made from either of these drawings. There are indications that these drawings whenever exhibited, either in the saloon or on the occasion of the visit to Northall of Mr. and Mrs. Polsdorfer, were exhibited not earlier than the time of making of the first caps. Mary Polsdorfer, while stating that it was shown to her on a visit of herself and Henry Polsdorfer to Northall in the latter part of 1891, attempts to fix the date by the making of slipper cases for Christmas and before the birth of her child on February 23, 1892; but the families were intimate; she made many visits before and after that time, and the casual exhibition of the drawing by Northall to her husband might have been on the same evening the slipper cases were spoken of or equally well on any other. On cross-examination she states that Northall showed her a cap at the same time that he showed the drawing, though she afterward says it was only the drawing of the cap. If the drawing and the cap were shown her together, the visit could not have been in December, 1891, nor earlier than the latter part of April, 1892, for the caps were not made until April.

40 Heidt was at the meeting in Haas's saloon when Northall drew the sketch on the back of an oyster sign, and states that the meeting was on Saturday before Christmas, 1891, but also says that Northall had a cap in his pocket, and that the rest of the party were handling it, although he did not. If Northall had the cap at the meeting in the saloon the meeting was as late as April. Comparing critically Frank Haas's testimony and Oslage's, it would appear that the meeting at the saloon was much later than December. Finally the drawing, Northall's Exhibit No. 1, upon its face raises doubts, in that the date appears to be written over an erased word, the lower loop of a letter remaining between the parallel lines of the handle of the decapper.

The conflict of testimony upon the first conversation at the factory between Bernardin and Northall after Bernardin's return from Washington in April, 1892, separately considered, leaves the mind in great doubt as to exactly what was said. It is examined in vain for substance upon which to base a conclusion either that Northall communicated the idea to Bernardin or Bernardin to Northall. But reconciling the testimony where possible and constructing language and circumstance into a consistent whole, it is thought that Northall did not have the invention as claimed in December, 1891; that it was first referred to in a later conversation between Northall and Bernardin when Bernardin was considering

the corrugated and the perforated sealing cap; that the conception originated with Bernardin and was not original with Northall, but was communicated by Bernardin to Northall, although Northall was the first to communicate the idea to Thuman, probably during Bernardin's absence in April.

Weight must be given to the facts of manufacture without seeking the consent of Northall; the orderly application by Bernardin for a patent, not with undue haste nor with unusual delays, but conformably with the common experience; the absence of Northall's assertion of title for many months and until after his discharge, and the long delay in his application for a patent; these all concur in showing Bernardin to be the inventor and the first, and accordingly the judgment of priority is awarded to him and the decision of the examiners-in-chief is reversed.

The record in this case abounds in improper remarks, long statements touching the conduct of counsel and witnesses, imputations of fraud, perjury, bribery, and finally, by the introduction of Inkenebrandt's testimony, implication in the violent death of Ives, which are not proof and are not proper parts of the record. Most of the matter alluded to should have been expunged before printing and would have been excluded upon motion. *Smith v. Elliott*, 9 Blatch., 400, 407. The record in this case is very voluminous at best, unnecessarily so, from the method of examination adopted, but that the office should be burdened with the reading of additional 41 and wholly irrelevant discussion of other matter of the kind alluded to is intolerable, and the insertion of such things in the record cannot be too strongly condemned.

Decision reversed.

JOHN S. SEYMOUR,
Commissioner.

March 23, 1895.

EXHIBIT "B."

Filed June 25, 1896.

\$25 applied.

United States Patent Office.

W. H. NORTHALL

vs.

WILLIAM PAINTER

vs.

ALFRED L. BERNARDIN.

} Interference No. 15992. Bottle-sealing
Device.

To the Hon. the Commissioner of Patents.

SIR: In matter above named I, William H. Northall, hereby pray an appeal to the United States Court of Appeals for the District of Columbia from your honor's decision of March 23rd, 1895, awarding priority of invention to Alfred L. Bernardin.

The following reasons for appealing are assigned:

That the Hon. Commissioner erred:

First. In finding said Bernardin to be the inventor of the improvement in bottle-sealing devices which is the subject of said interference, and in awarding priority to said Bernardin.

Second. In failing to find that said Northall was the original and first inventor of said improvement and entitled to the patent therefor, and to award priority to said Northall.

Third. In failing to find that said invention was made, exhibited, and described by said Northall prior to any alleged conception or invention thereof by said Bernardin.

Fourth. In failing to find that said invention was exhibited and described by said Northall to the witnesses Henry Polsdorfer, Mary Polsdorfer, Frank Haas, McDowell, Wagner, Zeigler, Heidt, and Oslage prior to any alleged conception thereof by said Bernardin, and also described by said Northall to the officers and employees of the Bernardin Bottle Cap Co. prior to any mention or suggestion thereof by said Bernardin, and also that the same was communicated to said Bernardin by said Northall, and that the evidence indicated that said Bernardin had no conception thereof until after it was so communicated to him by said Northall.

Fifth. In failing to find that said invention, having been first made and described by said Northall, was unjustly and fraudulently appropriated by said Bernardin, who was not the inventor thereof, and in failing to adjudge priority in favor of said Northall and to award him the patent for said invention.

42 Sixth. In finding that at no time prior to his discharge did Northall make to Bernardin any claim to be the originator of the said invention, whereas he should have found that Northall communicated the invention to Bernardin and to others connected with and representing the company as original with himself, and thereafter constantly treated and referred to it as his, and that neither Bernardin nor others disputed the fact that it originated with Northall until after the interference was declared and after his consultation with counsel revealed to Bernardin the necessity of making such claim.

Seventh. In finding that Northall made the tools for forming the bottle-sealing devices or caps under Bernardin's direction without any suggestion from Northall that the tools would be the means for manufacturing an article which the company would not have the right to make, or that the bottle-sealing devices when made would embody the invention of Northall, whereas he should have found that said invention was disclosed to said Bernardin as the invention of said Northall; that Bernardin was fully informed of Northall's claim of invention, and that he desired and expected to obtain a patent therefor.

Eighth. In finding that there was no suggestion by said Northall that the invention was one for which the company would be obliged to treat with its subordinate, whereas he should have found that Northall repeatedly asserted his right as inventor and his desire and intention to obtain a patent therefor, and, among others, to said Bernardin and other officers and agents of said Bernardin Bottle Cap Co.

Ninth. In failing to find that the patent that Northall understood Bernardin was preparing to apply for was to be, as it should have been, in the name of Northall as inventor.

Tenth. In finding that said Northall made no attempt to exact an agreement for recompense or to obtain a patent in his own name while the invention was advancing to the point of commercial manufacture.

Eleventh. In failing to find that said Bernardin represented to said Northall, prior to the allowance of said Bernardin application, that said improvement was not patentable, and that he had ascertained that no patent could be obtained for said invention and discouraged Northall from applying therefor.

Twelfth. In finding that said Bernardin was the principal owner of the Bernardin Bottle Cap Co., and that Northall worked under his direction, whereas he should have found that said company was a corporation, in which said Bernardin was only a stockholder and an officer.

Thirteenth. In finding that all the persons who saw the making of the drawing at the Haas saloon were there on other Saturday nights after the occasion described.

Fourteenth. In finding that the time of the meeting at which Northall made said drawing in said saloon is not fixed by anything more than arbitrary association of ideas, and that it is entitled to little weight.

43 Fifteenth. In finding that there are indications that the Northall drawings in evidence were exhibited not earlier than the time of making the first caps, whereas he should have found that they were unmistakably shown to have been exhibited in December, 1891.

Sixteenth. In finding that said Northall did not have the invention as claimed in December, 1891, whereas he should have found that the said invention was made and disclosed by said Northall in December, 1891, and thereafter disclosed by said Northall to said Bernardin, as well as to others, prior to any conception or mention thereof by said Bernardin.

This appeal is taken under the act of Congress approved February 9th, 1893, section 9, providing for appeals to the United States Court of Appeals of the District of Columbia.

I pray that this appeal may act as a supersedeas, and that it shall stay the issue of letters patent to A. L. Bernardin, covering the subject-matter in controversy.

I further pray that a certified transcript of the record in this case will be furnished, and that the same may be certified to the Court of Appeals. I herewith tender the sum of twenty-five dollars on account of the costs of said transcript, and I will promptly respond to call for further funds should said amount be insufficient.

Very respectfully, WILLIAM H. NORTHALL,
By WM. H. GUDGEL, Attorney.

(Local address, care Mr. Howell Bartle, 639 F street N. W.,
Washington, D. C.)

April 6th, 1895.

EXHIBIT "C."

Filed June 25, 1896.

This is an appeal from the decision of the Commissioner of Patents in an interference proceeding involving the following issue:

"A metallic bottle-sealing cap having its lower edge adapted to be pressed into contact with a locking shoulder, and provided above the said edge with a circumferential, outwardly projecting rib or bead for engagement by the removing tool."

There were three parties to the original proceeding—Alfred L. Bernardin, William H. Northall, and William Painter.

The primary examiner awarded priority of invention to Northall, and upon appeal to the examiners-in-chief the decision was affirmed. The appeal was then taken to the Commissioner, who reversed the examiners and awarded priority to Bernardin. Northall alone has appealed from that decision, and the claim of Painter is therefore no longer matter of consideration.

Applications for patents were filed by the parties in the following order of time: Bernardin, July 21, 1892; Painter, January 16, 1893; Northall, March 31, 1893.

The record contains a great mass of conflicting evidence, 44 from which we are to determine who is entitled to priority; or, rather, as between the two parties left to the controversy, who is the inventor? For one thing, which is very plain from the record, is that, as between Bernardin and Northall, this is not a case of two independent inventors who, working in ignorance of each other's discoveries, have exploited the same idea.

Bernardin claims to have conceived the idea in February, 1892. He was then and had for some years been the president of the Bernardin Bottle Cap Co.

In and before 1891 this corporation, whose place of business was Evansville, Indiana, had been engaged in the manufacture of bottle-sealing devices, the leading one of which consisted of a tin cap for the mouth of the bottle, with a collar which fastened about its neck and was connected by strips with the cap. In February, 1892, Bernardin learned of a cap, manufactured in Baltimore, that was made in a single piece and was much simpler than the one made by his company.

This was made to press down about the shoulder or rim of the bottle neck, and its edges were corrugated, so as to make a projecting edge or flange for its easy removal.

This discovery alarmed Bernardin, and he began to consider improvements that might be made in such devices. There is no doubt that he considered two of these seriously, and went to Washington to apply for patents about April 16, 1892. One was a cap with corrugated edges, which were to fit similar corrugations in a bottle made for the purpose, and the other was made with perforations in which a tool could be inserted for removal. He was informed by his attorneys that these devices were probably not patentable.

They were also expensive to make and did not sufficiently overcome the difficulty of removal. He was very much discouraged and returned home. The great object in view was a cap, inexpensive to make, that would be a perfect seal and at the same time easily removable without injury to the bottle.

Bernardin claims that he had also conceived the idea of the cap in issue, with the bead or rim at the top, in February, 1892, and had discussed it, as well as the others, with Northall, who was the superintendent of the machine shop of the bottle cap company. He says that he made a rough sketch of the one with the bead, and that Northall preferred it to the others, but he (Bernardin) thought it would be too expensive to make. When he returned discouraged the matter was taken up again, and he suggested to Northall a simpler way of pressing on the bead or rim and directed him to make tools for the experiment. Proving satisfactory, he had some of the caps made and went to Washington in July, 1892, and filed his application for a patent.

Northall was a skilled mechanic and had been in the service of the bottle cap company for about eight years.

He claims that the idea of making a cap with a bead was suggested to him by the rim found on metallic cartridges and was matured on December 19, 1891, on which day he made a drawing of the same, with a tool to be used in removing it, and disclosed it to a number of persons.

He admits that he knew of the two devices of Bernardin before referred to and of his trip to Washington concerning patents for them, and says that before Bernardin's return he, having no confidence in the efficacy of those inventions, mentioned his own invention of the cap in issue to a fellow-workman and to the treasurer of the Bernardin Company. These persons say that he did so, but that he referred to his invention as having been made the night before. He also says that he showed his drawing to Bernardin on his return, who was pleased with it and ordered the caps to be made and tested, but afterwards informed him it was not patentable. In part explanation of his conduct in taking no steps himself to apply for a patent, he claims to have been too poor to undertake it and to have been willing for the Bernardin Company to do so, expecting, however, to have an interest in it. He says that he was dependent upon his position with the company, which paid him \$100 per month, and let the matter proceed until some time in August, 1892, when he saw from copies of papers in the Patent Office, shown him by Bernardin, that the application was made in the latter's name. He undertakes to explain his subsequent inaction by the fear he had of losing his place, by his ignorance of the law in such matters, which caused him to think that he was too late, and, to some slight extent, by hopes that he would be given an interest in the new corporation forming and formed to exploit the invention.

There are, too, some other circumstances growing out of his connection with the Crown Cork and Seal Co. of Baltimore, assignee of Painter, and also holder of an option upon his (Northall's) claim

herself in the event of its success, that tend in some degree to affect the integrity of his claim.

On the other hand, Bernardin's conduct is susceptible of a reasonable explanation, and it is difficult to conceive of any course of conduct more consistent with his declared purpose than that pursued by him since April, 1891.

According to his own statement, he made no disclosure of his invention of the disputed cap to any one except Northall until his return from Washington, about the last of April, 1892. It seems clear that he did not mention it to his Washington attorneys, Munn & Co., when they discouraged him as regards the patentability of the first two devices on which he filed applications. He has produced no sketch or drawing made prior to the application for patent.

He undertakes to account for the neglect of this invention by saying that he had deemed it impracticable because of the difficulty and expense that he apprehended in making the bead or rim.

There is an irreconcilable conflict between the statements of Bernardin on one side and of Northall on the other. Fortunately it is not necessary to analyze these, weighing circumstance against circumstance and setting off inference against inference, in order to determine which of them is most entitled to belief.

46 In our opinion the case must turn upon the truth or falsity of Northall's statement that he made the drawing which fully discloses this invention on December 19, 1891.

If he made the drawing on that date, he is the inventor. He has produced a piece of paper with the drawing on it, with that date written upon it with a pencil.

He says that, having been at work on the invention for some time, he completed his plan and made the drawing on that day, which was Saturday, that he went to the saloon of Frank Haas after supper and talked with several acquaintances, some of whom he had not seen before, that he had come, and his companions, to have a quiet evening. Haas had lost his skill through having neglected the game so long that he said he had been working at a thing that would make him rich, and asked for a piece of paper to show them what he had been doing while absent. There was no paper, but some one hundred him a card-board "oyster sign" which Haas had over his lunch counter, and, turning it over, he made a rough sketch on the back of his bottle cap and tool for removing it.

This statement is corroborated by Frank Haas, the saloon-keeper; McDowell and Zeigler, draymen; Heidt, a school janitor; Oslage, a grocer, and Wagner, a horseshoer, who were all present. These witnesses are all positive that it occurred on Saturday night before Christmas—December 19, 1891—and account reasonably for their ability to fix the precise date. Haas said that he put the sign away at the end of the oyster season, and found and produced it after the controversy arose.

These witnesses appear to be intelligent laboring and business men and to have no pecuniary interest in the result of the contro-

They had lived long in Evansville, were well known, and witness was offered to impeach their credibility.

They have either stated the truth or been guilty of wilful falsehood, it is now a question.

Northall is corroborated by two other individuals, Simeon and Augustus Daniels, witnesses. Henry A. Poldorfer who is a manufacturer of hardware, woodenware, etc., and a trained mechanic, says that he knew Northall well, and that they and their wives were intimate friends. Being interested in machinery and inventions, he frequently conversed with Northall upon such subjects.

He says that Northall showed him his drawing of the bottle cap in issue at his house in Evansville and explained it fully "between the middle and latter part of December, 1891." He recognized the drawing when produced, and remembered that it had December on it, but did not remember the day of the month. Mary E. Poldorfer testified to hearing the conversation and seeing the drawing also. She remembered that it was just before Christmas, because she had gone to Mrs. Northall's to join her in making some slipper cases for presents and her husband had gone with her. We find no reasonable ground for supposing that any of the foregoing 47 witnesses have confounded the Christmas of 1892 with that of 1891, as suggested.

The only direct attempt to break the force of all this corroborating evidence is by the charge that the date of this important drawing has been changed. It is charged that the date, as it now appears, has been written over an erasure, and both the original and an enlarged photographic copy have been offered for inspection in support of the charge.

It could be shown that this date has been tampered with; the fact would discredit Northall's whole case, and for that reason, and because the decision of the Commissioner is founded largely in that direction, we may be original and copy alike, and careful estimates possible with the aid of ample microscope and considerable magnifying power.

No witnesses were called to inspect the writings and testify as to the results of the observation.

With the greatest distrust of our own capacity in the matter, we are, nevertheless, compelled to rely upon our own inspection and to form our own opinion unaided.

That the drawing and the date both may have been traced over erasures of other things is not at all improbable. There was some conflict between Bernardin and Northall in regard to the time and place that the drawing paper itself had been obtained. Northall testified, without reference to this charge, which had not then been made or intimated, that the drawing was made on a piece cut from a sheet of old paper that he had brought with him to Evansville from his eastern home, and had had sketches on it which he "rubbed out" before putting this one on.

A pencil-mark is pointed out just beneath (that is, a little lower down the page) a letter in the word December, which the Commis-

similar thought was "the lower loop of a letter." This loop is plainly visible to the naked eye, in fact it appears even clearer than the writing above it, and shows no sign of a dimpled or pressed-in effect. It is true, in view of the purpose of visiting men, that some degree of that is usual, but we see no reason to suppose that this is the case in this particular instance.

Decisions founded on a conjecture of that kind should not prevail if the testimony of positive witnesses.

Our attention was called on the argument to another alleged indication of fraudulent alteration of the date which seems not to have been suggested to the examiners or the Commissioner. It is claimed that the photographic copy discloses the figure 3 in proximity to the one in 1891 of the date. Our conclusion is after examination that this also is a mistaken conjecture. What would be the result, however, if it be conceded that there is the tracing of the figure 3 as claimed? The conjecture that the original date was 1893 instead of 1891 is inconsistent with all the established facts of the case and unreasonable in any view that may be taken of Northall's conduct.

If Northall did not invent the cap, as claimed, he must have conceived the idea of claiming Bernardin's invention as his own 48 as early as April, 1892. The caps were first made soon after that date and Northall had notice of Bernardin's application for the patent as early as the summer of 1892. The invention was subject of local newspaper comment in September, 1892.

Now, if he prepared the drawing, as part of his plan to defraud Bernardin, he surely would not give it a date in the year 1893 or any other later than February, 1892, when, according to Bernardin, the knowledge of the invention was first communicated to him. Preparing it to antedate Bernardin, he would naturally have assigned his pretended invention to the year 1891. A change in the month of that year might have become important, but not so with the year. After much consideration we can conceive no circumstance that would lead Northall to commit so gross a fraud.

The present opinion will be referred to the record and file proceedings and documents certified to the Commissioner of the Patent Office as provided by law. It is so ordered.

SETI SHEPPARD,

Associate Justice.

Endorsed: Patent appeal No. 31. William H. Northall, appellant, vs. Alfred L. Bernardin. Opinion. Court of Appeals, District of Columbia. Filed Jan. 6, 1896. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing is a true copy of the opinion of said Court of Appeals delivered on the 6th day of January, 1896, in the case of William H. Northall, appellant, vs. William Painter and Alfred L. Bernardin, No. 31 patent appeals, Jan'y

les of said Court of
my name and affix
of Washington, this

WILLETT,
*Appeals of the
District of Columbia.*

atent Appeal Docket,

Court of Appeals of the District of Columbia, I
January Term, 1896.

WILLIAM H. NORTHALL, Appellant
vs.
NARDIN. } No. 31.

WILLIAM PAINTER and ALFRED L. BE
No. 15992.

Subject-matter: Bottle-sealing device
Patents.

Appeal from the Commissioner of Patents.
Script of record from

This cause came on to be heard on the transcript of record from
the Commissioner of Patents and was argued by counsel.

On consideration whereof it is now ordered and ad-
judged by this court that the decision of the said Commis-
sioner of Patents in this cause be, and
reversed.

JUSTICE SHEPARD.

Per Mr. J.

January 6, 1896.

(A true copy.)

(Signed)

[Signature]

WILLETT, Clerk.

RECORDED

January 10,

1896.

Office.

In the United States Patent Office.

NORTHALL:

es.

PAINTER:

es.

BERNARDIN:

Interference No. 15992. Bott-

tle-sealing Device.

To the Commissioner of Patents:

by his attorneys, But-

SIR: And now comes Alfred L. Bernardin,
Butterworth & Dowell, and moves:

be reopened for the

First. That the above-entitled interference could not with rea-
sonable diligence have been produced at the hearing, and that a
reasonable time be assigned within which if the several persons
Bernardin may introduce the testimony o

whose affidavits are filed in support of this motion and of others for the purpose of establishing the facts recited in said affidavits, and such other evidence as may be competent to make clear the facts in that behalf and to show:

(1.) That the drawing introduced in evidence in this cause on behalf of William H. Northall as "Northall's first drawing, Exhibit No. 1," in support of his alleged claim to priority of invention, was not made at the date alleged in the testimony of said Northall and his witnesses, to wit, December 19, 1891, but at a date long subsequent thereto, and that the true date originally placed upon said drawing was erased by the said Northall and a fictitious date written over the erased date prior to offering the same in evidence, and for the purpose of concealing the date when said exhibit was actually made, and thereby misleading the Commissioner of Patents and the court.

(2.) That the alleged date of the making and exhibition at the saloon of Frank Haas of the drawing offered in evidence on behalf of the said Northall as "Northall's Exhibit No. 3, card-board drawing," is erroneous, and that such exhibition occurred, if at all, and such drawing was made long subsequent to December, 1891, and subsequent to the making of the bottle caps embodying the invention in issue, at the works of the Bernardin Bottle Cap Company, in April, 1892.

Second. That an order be entered authorizing the use as 50 evidence in this cause of so much of the testimony of William H. Northall and his witness Henry B. Polsdorfer, taken in the pending interference No. 17284, between said Northall and Bernardin, for bottle-capping machines, as may be competent to show the relations existing between the said Northall and Polsdorfer and the interest of the latter in the result of the pending interferences.

Third. That the issuance of a patent to the said William H. Northall, in whose favor decision has been rendered by the Court of Appeals, overruling the decision of the Commissioner of Patents, be stayed, and further action upon the application of the said Northall involved in this interference be suspended pending the final determination of this motion.

In support of this motion are herewith filed affidavits of Joseph B. Church, Edwin B. Hay, Millard F. Hatton, John J. Nolan, Ernest D. McAvoy, R. C. Rice.

Reference will also be made at the hearing upon this motion and in support thereof to such parts of the evidence comprised in the record of testimony and exhibits filed in this cause in behalf of the parties thereto as may be deemed competent and proper.

A. L. BERNARDIN,
By BUTTERWORTH AND DOWELL,
His Attorneys.

January 22nd, 1896.

EXHIBIT "E."

Filed June 25, 1896.
No. 15992. M. H.
U. S. Patent Office.

NORTHALL }
v. } Bottle-sealing Device.
BERNARDIN. }

Motion to reopen.

Application of William H. Northall filed March 31, 1893, No. 468,524.

Application of Alfred L. Bernardin filed July 21, 1892, No. 440,790.

Mr. Wm. H. Gudgel for Northall.

Messrs. Butterworth & Dowell for Bernardin.

After a decision in his favor by the office and a reversal of that decision by the Court of Appeals of the District of Columbia, Bernardin moves to reopen this case for the purpose of introducing newly discovered evidence which he claims will probably change the result. The most significant part of the alleged newly discovered evidence is that of a partly erased writing, over which the date December 19, 1891, was written upon Northall's drawing Exhibit

No. 1. Upon this point the affidavit of Mr. Joseph B. Church
51 is presented to the effect that he deciphers the partly erased
writing to be February, 1893. A photograph taken about
the time the exhibit was put in evidence shows that there had been
an erasure, and enlarged photographs taken later show parts of let-
ters which cannot be deciphered from the drawing itself.

In answer to the affidavits of Bernardin upon this motion Northall makes an affidavit upon this point as follows:

"The paper upon which my original drawing was made was some that remained of what I was using for making sketches during the last two years I lived in Bridgeport, Connecticut. It had been used, and I erased what was on it before making this drawing.

"When I testified last fall in the machine interference about the 'loop' shown in the photograph of my drawing I thought it must be the upper part of a 'b,' as I knew I wrote December twice the night I made the drawings. I could not account for any kind of a loop in any other way. I am sure that I never wrote any word on that paper having a letter with a lower loop after I made the drawing, unless I accidentally made a lower loop when I intended an upper one. I write but little and sometimes get letters wrong and have to change them, but I have no distinct recollection of having done so when dating this drawing, though it might have happened. I sometimes wrote dates and other words on the sketches which I made in Bridgeport."

The question is whether this evidence was discovered since the

former trial. The general principles regarding new trials for newly discovered evidence are that an application therefor is looked upon by the courts with disfavor; that the evidence must have been discovered since the former trial; that the party must have used due diligence in procuring it on the former trial; that it must be material to the issue; that it must go to the merits of the cause and not merely to impeach the character of a witness; that it must not be merely cumulative; that it must be such as ought to produce on another trial an opposite result on the merits.

The bearing of this evidence of something imperfectly erased is important. A working drawing of a bottle-capping device in the hands of either of these parties as early as December 19, 1891, is extremely significant; a working drawing in the hands of Northall as late as February, 1893, would be of no special significance.

It was claimed by Northall that the evidence was cumulative. It is true that there was evidence tending to show that Northall did not make a working drawing of this invention as early as December 19, 1891, in the record, strictly so called. That evidence is circumstantial. In the trial upon appeal before the circuit court of appeals of this District it appears that enlarged photographs were exhibited to the court for the purpose of showing that there had been an erasure, and the argument appears to have been made that December 19, 1891, was not the true date of the paper. It does not appear that any testimony was presented to that court or that there is any in the record to the point of what the erased word or figures are, unless the exhibit itself may be considered such testimony. There is presented before me an account of this matter by Northall

52 himself which is in the nature of an admission that what was erased was a date, and that he erased it, and that he wrote the words and figures above it—December 19, 1891.

It has been held that the admission of a party is not evidence of the same kind as the testimony of other witnesses, and therefore is not cumulative, although relating to the same controverted fact. *Wayt v. Burlington, etc., R. Co.*, 45 Iowa, 217; *Humphreys v. Klick*, 49 Ind., 189; *Rains v. Ballow*, 54 Ind., 82; *Fletcher v. People*, 117 Ill., 190.

But the evidence tends to establish a fact that was not before in the case, to wit, that the drawing bore another date, and that the date it first bore was February, 1893. If this testimony is to be believed, and if it turn out to be, on more critical examination, of the tenor indicated, it appears to me to be destructive of Northall's case.

While impressed with this evidence, I deem it my duty, in view of the doubt whether the Commissioner has power to open a case after it has been considered and decided by the circuit court of appeals in this district on appeal, to disregard it and deny the motion. Were the petitioner without other remedy, I might take a different view of this case, but under section 4915 of the Revised Statutes he has a remedy by bill in equity, where, upon a record hereafter to be made, with a fuller knowledge of all the facts, it will

be adjudged whether he be entitled to the patent which must now be refused.

Without passing upon the other matters urged by Northall against this motion, the motion must be dismissed, and it is so ordered.

JOHN S. SEYMOUR,
Commissioner.

May 25, 1896.

EXHIBIT "F."

Filed June 25, 1896.

In the United States Patent Office.

WILLIAM H. NORTHALL	}	Interference No. 15992. Bottle-sealing Device.
<i>vs.</i>		
WILLIAM PAINTER		
ALFRED L. BERNARDIN.	<i>vs.</i>	

Motion to Stay Proceedings.

To the Commissioner of Patents.

SIR: And now comes Alfred L. Bernardin, by his attorneys, Butterworth & Dowell, and moves that further proceedings in the above-entitled interference be suspended, and that the issuance of a patent to Northall be stayed pending proceedings by bill in equity and the decision of the court in the case of Alfred L. Bernardin *vs.* The Commissioner of Patents and William H. Northall, to be forthwith instituted in the circuit court of the United States for the 53 district of Indiana, pursuant to the provisions of section 4915 of the Revised Statutes.

In support of this motion I shall refer at the hearing before the Commissioner to the records of the proceedings in the interference, to the affidavits, photographs, &c., filed in support of my motion to reopen the interference, and to the decision of the Commissioner of Patents on said motion rendered May 25th, 1896, and also to a copy of the aforesaid bill in equity.

ALFRED L. BERNARDIN,
By BUTTERWORTH & DOWELL,
His Attorneys.

EXHIBIT "G."

Filed June 25, 1896.

Intf. No. 15992.

S. E. T.

U. S. Patent Office.

NORTHALL }
 v. }
 BERNARDIN. } Bottle-sealing Device.

Motion.

Application of William H. Northall filed March 31, 1893, No. 468,524.

Application of Alfred L. Bernardin filed July 21, 1892, No. 440,790.

Mr. William H. Gudgel for Northall; Messrs. Butterworth & Dowell for Bernardin.

This is a motion by Bernardin "that further proceedings in the above-entitled interference be suspended, and that the issuance of a patent to Northall be stayed pending proceedings by bill in equity and the decision of the court in the case of Alfred L. Bernardin vs. The Commissioner of Patents and William H. Northall, to be forthwith instituted in the circuit court of the United States for the district of Indiana, pursuant to the provisions of section 4915 of the Revised Statutes."

The question as to whether the filing of a bill in equity by a defeated party to an interference should stay the issue of a patent to the successful party was fully discussed by the Secretary of the Interior in the decision in the case of *Ex parte* Sargent, 12 O. G., 475, C. D., 1877, 125, and was decided in the negative. The same conclusion was reached in the case of Wells *v.* Boyle, 43 O. G., 753, C. D., 1888, 36.

After a careful consideration of the question I am of the opinion that the practice indicated in said decisions should be followed.

The motion is therefore denied.

S. T. FISHER,

Acting Commissioner.

June 12, 1896.

Filed June 25, 1896.

M. H.

DEPARTMENT OF THE INTERIOR,
 UNITED STATES PATENT OFFICE,
 WASHINGTON, D. C., June 23, 1896.

In the Supreme Court of the District of Columbia.

U. S. ex Rel. ALFRED L. BERNARDIN

v.

JOHN S. SEYMOUR, Commissioner of Patents,

Respondent.

At Law. No. 40029.

It is stipulated by and between counsel that the annexed copy of the bill of complaint is a true copy of the bill in equity, No. 9358, filed in the circuit court of the United States for the district of Indiana, entitled Alfred L. Bernardin, complainant, v. William H. Northall and John S. Seymour, Commissioner of Patents, defendants, and that said copy may be used in the present suit of mandamus against John S. Seymour, Commissioner of Patents, in lieu of a certified copy, subject to correction if found incorrect.

W. A. MEGRATH,

Counsel for Commissioner of Patents.

BUTTERWORTH & DOWELL,

Counsel for Alfred L. Bernardin.

EXHIBIT "H."

Filed June 25, 1896.

In the Circuit Court of the United States for the District of Indiana.

ALFRED L. BERNARDIN, Complainant,

vs.

WILLIAM H. NORTHELL and JOHN S. SEYMOUR, Commissioner of Patents, Defendants.

In Equity.

To the honorable the judges of the circuit court of the United States for the district of Indiana:

Alfred L. Bernardin, a citizen of the State of Indiana and residing at Evansville, in the county of Vanderburgh and State of Indiana, brings this his bill of complaint against William H. Northall, a citizen of said State, residing at Evansville aforesaid, and John S. Seymour, Commissioner of Patents, having his official residence at the city of Washington, in the District of Columbia.

1. And thereupon your orator complains and says that he, being the true, original, and sole inventor of a new and useful improvement in bottle-sealing devices known as the "beaded sealing cap" or beaded cap, which invention or improvement was not known or used by others in this country and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof and which had not been in public use or

on sale in the United States for more than two years prior to
55 his application for a patent therefor, on the 21st day of July,
A. D. 1892, made application in due form of law to the
Commissioner of Patents for letters patent for said invention and
filed in the United States Patent Office a written description of
the said invention and of the manner and process of making,
constructing, and using the same in such full, clear, concise, and
exact terms as to enable any persons skilled in the art or science to
which it appertains or with which it is most nearly connected to
make, construct, and use the same, explaining the principle thereof
and the best mode in which he has contemplated applying that
principle, so as to distinguish it from other inventions, and particu-
larly pointing out and distinctly claiming the part or improvement
which he claims as his invention or discovery, as upon reference to
said application or a duly authenticated copy thereof, here in court
ready to be produced and shown unto your honors, will more fully
appear, and to which your orator craves leave to refer.

II. And your orator further shows unto your honors that he
conceived the aforesaid invention during the month of February,
1892, and disclosed it to the defendant William H. Northall a few
days thereafter and during the month of March, 1892; that at and
prior to the last-mentioned dates your orator was and still is the
president, superintendent, and general manager of the Bernardin
Bottle Cap Company of Evansville, Indiana, manufacturers of bottle
caps constructed in accordance with patents theretofore issued to
your orator as the inventor, and the said Northall was at that time
and prior thereto and until the 29th of March, 1893, a trusted em-
ployé of said Bernardin Bottle Cap Company, working under the
direction and supervision of your orator, and while so employed
assisted as a mechanic in making the first beaded caps that were
made embodying your orator's aforesaid invention, which caps were
made during the month of April, 1892, under your orator's direc-
tion and supervision and as a reduction to practice of your orator's
aforesaid invention.

III. And your orator further shows unto your honors that on due
proceedings had in the Patent Office your orator was by an official
letter dated October 15, 1892, notified by the Commissioner of Patents
of the allowance of said application, reciting in said notice that
six months from the date thereof would be allowed for the payment
of the final Government fee, upon the payment of which the patent
would issue to your orator; and the defendant, the said William H.
Northall, was informed by your orator of the allowance of said
application, the written notice of which he saw and read when it
was received, on or about the 18th of October, 1892, but neither at
that time nor at any other time in your orator's presence or to his
knowledge until the doing of the acts hereinafter complained of
did he make any claim that he, the said Northall, was the inventor,
either in whole or in part, of said invention.

IV. And your orator further shows unto your honors that there-
after, to wit, on the 16th day of January, 1893, one William Painter,
of Baltimore, Maryland, the secretary and business manager of the

Crown Cork & Seal Company of Baltimore, Maryland, having theretofore, through his agent, without your orator's knowledge or consent, surreptitiously obtained one of your orator's aforesaid beaded sealing caps from the works of the Bernardin Bottle Cap Company, where your orator's experiments were being conducted, during the absence of your orator and his employés and when the works were closed, and having thus obtained said cap the said William Painter filed in the United States Patent Office an application for a patent for the same invention as that described and claimed in your orator's aforesaid application; and thereafter, to wit, on the 24th day of February, 1893, an interference was declared between your orator's aforesaid application and the application so filed by said William Painter for the purpose of determining the question of priority of invention in accordance with the provisions of the Revised Statutes and the rules of practice of the Patent Office.

V. And your orator further says that the said William L. Northall, as a trusted employé, receiving and having the confidence of your orator, was charged with the duty of preparing and did prepare drawings for making the tools and assisted in making said tools for the purpose and in manufacturing said sealing cap, and was fully informed of each step taken by your orator from the first conception of the invention, in February, 1892, until the same was reduced to practice, and on until a patent was applied for by your orator and allowed by the honorable Commissioner of Patents.

VI. And your orator further says that after his said invention was completed and reduced to practice and he had applied for a patent therefor, which had been allowed, of all of which and with the details of which the said Northall had, as aforesaid, full knowledge, he, the said Northall, did, as your orator is informed and believes, and hence avers and charges, on or about the month of February, 1893, corruptly and with the intent and purpose of defrauding your orator and preventing him from obtaining his patent on said invention which he, the said Northall, knew had been allowed by the Commissioner of Patents, and with the purpose and intent to appropriate said invention in whole or in part to his own use or derive some pecuniary benefit therefrom, and for the purpose of carrying out and accomplishing said object and to despoil your orator of his said property in said invention, the said Northall, while he was still a trusted employé of your orator and sustained toward him confidential business relations as such employé, personally and by his agent and attorney entered into a secret and clandestine correspondence with a competitor of your orator, revealing to said competitor or to his agent the secret and confidential business of your orator in reference to said invention, and, further, in carrying out said object and purpose said Northall on or about the first day of April, 1893, entered into an agreement with William C. Wood, of the city of Washington, District of Columbia, the agent of your orator's competitor, to wit, the Crown Cork & Seal Company of Baltimore, Maryland, by the terms of which agreement the said

competitor agreed and undertook to pay to the said Northall fifty (\$50.00) dollars a month for each and every month during the whole period he should be engaged in performing the service in said contract stipulated to be performed by the said Northall. By the terms of said contract, a copy of which is hereto attached and marked "Exhibit A" and made a part hereof for reference, the said Northall agreed and undertook to prevent your orator from obtaining his said patent and to secure for your orator's competitor, to wit, the Crown Cork and Seal Company of Baltimore, Maryland, the ownership and control of said invention; that the said William C. Wood, as agent for said Crown Cork & Seal Company, by the terms of said contract reserved to himself the power and authority to withhold and altogether withdraw said monthly stipend from the said Northall at any time if he failed to perform to the satisfaction of said Wood the service exacted of him by said Wood under the terms of said contract.

VII. And your orator further shows unto your honors that on the 31st day of March, 1893, the said William H. Northall filed in the United States Patent Office an application for a patent for the said invention, and on the 7th day of April, 1893, the said Northall was made a party to the aforesaid interference between your orator's application and the application of the said Painter.

VIII. And your orator further says that he is informed and believes, and hence avers, that in pursuance of said agreement and in promoting the object of said conspiracy the said Northall, in his aforesaid application, claimed that he was the original and first inventor of said beaded sealing cap, and thereupon he, the said Northall, did, as your orator is informed and believes, and hence avers and charges, fabricate testimony by erasing the date and inscription on a certain drawing which disclosed the invention and writing thereon another and different date so as to make it appear that said drawing was made at an earlier period than it actually was made, all of which was done to induce the belief that said drawing was made as of the date so fraudulently written on said drawing, when in truth and in fact it was made more than a year subsequent thereto.

IX. And your orator further says that he is informed and believes, and hence avers, that in promoting and carrying out the intent and purpose aforesaid the said William H. Northall prevailed upon certain witnesses to testify that certain drawings disclosing the said invention were made and exhibited to them and certain writing was placed thereon on a date earlier than the true one, the said Northall well knowing that the testimony of the said several witnesses in that behalf was incorrect and untrue.

X. And your orator further says that on the 23rd day of March, A. D. 1895, upon the pleadings and proofs taken and filed in the case, the Commissioner of Patents rendered a decision awarding priority of invention to your orator, Alfred L. Bernardin, as against the claims of both the said Painter and the said Northall, as by reference to said decision or a duly authenticated copy thereof here

in court ready to be produced and shown unto your honors
58 will more fully appear and to which your orator craves leave
to refer, and in view of the Commissioner's decision against
his alleged claim to the invention the said Painter dropped out of
the interference, but said Northall, in carrying out his said agree-
ment, took an appeal to the Court of Appeals of the District of Co-
lumbia, your orator's said competitor paying all bills and defraying
all expenses incurred in and about that behalf, and said cause came
on to be heard before the Court of Appeals on the 12th day of No-
vember, 1895, on the evidence produced before the Commissioner,
said false and fraudulent drawings so as aforesaid fabricated being
a part of the record and accepted by the court as true and genuine,
and on the 6th day of January, 1896, the said court rendered a
decision reversing the decision of the Commissioner of Patents for
reasons recited in said decision, as by reference thereto or to a duly
authenticated copy thereof here in court ready to be produced and
shown unto your honors will more fully appear.

XI. And your orator further says that so skillfully made were
the aforesaid erasures, alterations, and changes in the date and in-
scription upon the drawing and paper that neither your orator nor
his counsel suspected or detected the same, and only learned of it
after all the testimony in said interference case had been taken and
filed and the case set for hearing and about to be heard by the Court
of Appeals of the District of Columbia on appeal by the said Northall
from the decision of the Commissioner of Patents awarding your
orator to be the true and original inventor.

XII. And your orator further says that by reason of said false
and fraudulent representations and skillful fabrication of testi-
mony by the erasures and changes made upon said drawing and
paper as aforesaid the said Court of Appeals of the District of Co-
lumbia was imposed upon and induced to believe that the dates so
falsely fabricated were the original and correct dates, whereas they
were and were well known to said Northall to be incorrect and
untrue.

XIII. That by reason of such false and fraudulent testimony so
as aforesaid fabricated the said Court of Appeals of the District of
Columbia was imposed upon and misled and *were* induced to rely
upon the genuineness and honesty of said false and fraudulent
dates so as aforesaid fabricated and which were intended to indicate
and induce the belief that said false and fraudulent date was that
upon which said drawing was made, and therefore gave judgment
reversing the decision of the Commissioner of Patents, who had
awarded priority of invention to your orator.

XIV. And your orator further complains and says that he has
invested and expended large sums of money in experimenting, de-
veloping, and reducing to practice his aforesaid invention and for
the purpose of making the same commercially practicable and
profitable to himself and of advantage to the public; that the in-
vention is of great commercial utility and value; that its novelty,
superiority, and value is generally recognized, yet the said Northall,
well knowing the premises and the rights of your orator as aforesaid,

but contriving and conspiring to injure and deprive your orator of the profits, benefits, and advantages which might and otherwise would have accrued to him from said invention and the letters patent to be issued thereon, set up, as aforesaid, an alleged claim to the invention for the purpose of an interference in the interest of the said Crown Cork & Seal Company, and said interference has been prosecuted at the expense of the said Crown Cork & Seal Company, as your orator is informed and believes, and hence alleges.

XV. That the said William H. Northall, as an employé of the Bernardin Bottle Cap Company, working under the direction and supervision of your orator and assisting in the work of making the beaded caps embodying your orator's invention, continued to receive your orator's confidence and friendship, and affecting an earnest desire to aid your orator in preparing drawings and tools to produce said beaded caps, and had full knowledge of your orator's acts and doings in the matter of experimenting and developing your orator's aforesaid invention until the 29th day of March, 1893, about which time your orator was informed that his theretofore trusted employee had been and was then engaged in clandestine correspondence with the Crown Cork & Seal Company or the agent of said company, competitors in business of the Bernardin Bottle Cap Company, with reference to your orator's said invention, for the purpose of setting up a claim thereto and regarding the transfer of said claim to said company, whereupon the said Northall was discharged from the service of the company.

XVI. That the aforesaid acts and doings of the said defendant have caused and are causing your orator great injury and damage, and that notwithstanding the novelty and value and utility of your orator's invention he is wholly without protection and is being deprived of his rights in that behalf and is suffering irreparable loss and damage.

XVII. And your orator says that although the appeal hereinbefore mentioned, prosecuted by the said Northall from the decision of the Commissioner of Patents to the Court of Appeals of the District of Columbia, was in conformity to section 4915 of the Revised Statutes of the United States, authorizing and providing for such appeals, and the review and revision of the decision of the Commissioner of Patents in that behalf by the said Court of Appeals, yet your orator says that said court was without jurisdiction in that behalf to modify, reverse, revise, or annul the said decision of the Commissioner of Patents rendered in that behalf, the statute of the United States providing for such appeals and review to the contrary notwithstanding.

Your orator further says in that behalf that said court was wholly lacking in jurisdiction to hear and determine and revise or reverse the decision of the Commissioner of Patents, because all matters pertaining to the granting of patents by the United States to inventors and the determination of every question in that behalf is and at the same time and theretofore was conferred upon and by law belongs to the executive department of the Government, and

has been by law specially conferred upon the Bureau of Patents and the Commissioner of said bureau, which said bureau and the official head thereof form a part of the departmental organization and machinery of the executive department of the Government, and therefore an appeal from the official act in question being an official act of the executive department of the Government, acting within the jurisdiction properly conferred upon it under the Constitution of the United States, cannot be reviewed on appeal or writ of error prosecuted to the judicial department of the Government and reversed or nullified by a court of said judicial department.

And forasmuch as the said executive and judicial departments of the Government are separate, co-ordinate, coequal, and independent, said appeal for the purpose of review of said official action so, as aforesaid, prosecuted from the Commissioner of Patents to a judicial tribunal of the judicial department of the Government, to wit, to the Court of Appeals of the District of Columbia, is in contravention of policy of the Government and in violation of the Constitution of the United States, and hence the finding and decision of said court reversing the decision of the Commissioner of Patents rendered in his behalf in *caveat non judicata*, void, and of no effect; and your orator says that but for said action of the said Court of Appeals in thus reversing the finding and decision of the honorable Commissioner of Patents, your orator's patent in said invention, to which by the decision of said Commissioner your orator was entitled, would long since have been issued to him.

Wherefore your orator prays your honors to determine whether said writ of error so as aforesaid prosecuted was operative in law to reverse or annul the decision of the said Commissioner of Patents, and that such order and decree may be made in that behalf as may be just.

XVIII. And your orator further prays that this honorable court, on notice to the defendants, the said William H. Northall and the Commissioner of Patents, John S. Seymour, and other due proceedings had, may adjudge that your orator is entitled, according to law, to receive a patent for his said invention, as set forth in his aforesaid application and specified in the claim therof, so that the said Commissioner of Patents, John S. Seymour, or his successors in office may be authorized to issue letters patent to your orator for said invention, in accordance with the decision of your honors, and for such other and further relief in the premises as the facts in the case may require and to your honors may seem meet.

And to this end may it please your honors to grant unto your orator the writ of *subpoena ad respondendum* issuing out of and under the seal of this court directed to the defendant the said William H. Northall commanding him on a certain day and under a certain penalty to be and appear in this honorable court and then and there to answer the premises and to stand by and abide by such order and decree as may be made in this behalf, and also a writ of

51 *Subpoena ad respondendum*, directed to the said John S. Seymour, Commissioner of Patents, commanding him on a day certain to appear and answer this bill of complaint.
And your orator will ever pray, &c.

(Signed)

ALFRED L. BERNARDIN,

Complainant.

(Signed) BUTTERWORTH & DOWELL,
Solicitors and of Counsel.

U. S. OF AMERICA,
State of Indiana, County of Vanderburgh, } as:

On the 26th day of May, A. D. 1896, before me personally appeared Alfred L. Bernardin, the above-named complainant, who, being duly sworn, deposes and says that he has read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ALFRED L. BERNARDIN,
Complainant.

Subscribed and sworn to before me this 28th day of May, A. D. 1896.

[Signature]

NOBLE C. BUTLER, Clerk.

UNITED STATES OF AMERICA, }
District of Indiana, } as:

I, Noble C. Butler, clerk of the circuit court of the United States within and for the district aforesaid, do hereby certify that the above and foregoing is a full and true copy of the bill of complaint in the cause of Alfred L. Bernardin against William H. Northall *et al.*, filed in my office on the 28th day of May, 1896, as fully as the same remains upon the files now in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 28th day of May, A. D. 1896.

(Seal of the Court.)

NOBLE C. BUTLER, Clerk.

Exhibit "J"

Filed June 25, 1896.

Washington, D. C., June 19th, 1896.

Mr. Commissioner of Patents.

Sir: Herewith please find that in New York the sum of \$500
dollars payable to the order of the Commissioner of Patents to be
applied as the trial fee upon my application for
sealing devices filed July 21, 1892—serial No. 500,760—and allowed
October 15th, 1892. Said application having been withdrawn from

for the purpose of an interference with it by one William Painter and William H. Northall for the same invention, and said interference having been decided by the Commissioner of Patents on March 23rd, 1895, in my behalf complied with all the requirements of the statute, and your final decision being that my patent, I herewith hand you the final fee and ask that the patent which you have decided I am entitled to have be issued to me.

Very respectfully,

ALFRED L. BERNARDIN,
By BUTTERWORTH & ARDIN,
ND DOWELL,
His Attorneys.

EXHIBIT "J."

The within-noted application of Bernardin drawn from issue for the purpose of interference having been decided adversely to Bernardin on appeal to the Court of Appeals of the District of Columbia, the final fee of twenty dollars tendered will not be applied, and the patent to Bernardin is denied.

It is my opinion that the decision of the Commissioner of Patents on the question of priority, now reversed on appeal to the Court of Appeals of the District of Columbia, and prominently decided in favor of relator by the decision of the court.

n having been withdrawn from issue for the purpose of interference, and said interference having been decided adversely to Bernardin on appeal to the Court of Appeals of the District of Columbia, the final fee of twenty dollars tendered will not be applied, and the request to issue a

ioner was favorable to said decision having been made by the Court of Appeals of the District of Columbia, and prominently decided in favor of relator by the decision of the court.

J. FISHER,
Acting Commissioner.

June 15, 1896.

Memorandum.

Exhibits A, B, C, D, E, F, G, I, and J are certified to as true copies of originals by the acting Commissioner of Patents.

Judgment.

In the Supreme Court of the District of Columbia.

The United States et al. v. ALFRED L. BERNARDIN, At Law. No.
John S. Seymour, Commissioner of Patents. 40029.

This cause coming on to be heard upon a writ of mandamus against the respondent, John S. Seymour, Commissioner of Patents, he relator's petition for it, and counsel having been heard thereon, it is therefore on the 15th day of June, 1896, by the court in the cause to show cause aforesaid, ordered and the petition be, dismissed, and the petition be, dismissed at the cost of relator.

Petitioner in this cause having prayed an appeal to the Court of Appeals of the District of Columbia from the

dismissing the petition, the same is allowed, and bond is fixed in the penalty of two hundred dollars.

L. E. McCOMAS, *Justice*.

63

Memorandum.

July 2, 1896—Bond for appeal filed.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Rel.* ALFRED L. BERNARDIN } At Law. No.
vs. } 40029.
JOHN S. SEYMOUR, Commissioner of Patents.

The President of the United States to John S. Seymour, Commissioner of Patents, Greeting :

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal noted in the supreme court of the District of Columbia on the 1st day of July, 1896, wherein Alfred L. Bernardin, relator, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Biugham, chief justice of the supreme court of the District of Columbia, this 2d day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 2 day of July, 1896.

W. A. MEGRATH,
Attorney for Appellee.

S. T. FISHER,
Acting Com'r.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss.:
District of Columbia,

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 84, inclusive, to be true copies of originals in cause No. 40029, at law, wherein The United States *ex rel.* Alfred L. Bernardin is plaintiff and John S. Seymour, Commissioner of Patents, is defendant, as the same remain upon the files and records of said court.

Seal Supreme Court my name and affix the seal of said court, at of the District of the city of Washington, in said District, this Columbia. 14th day of July, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 603. The United States *ex rel.* Alfred L. Bernardin, appellant, *vs.* John S. Seymour, Commissioner of Patents. Court of Appeals, District of Columbia. Filed Jul- 22, 1896. Robert Willett, clerk.

64 [Endorsed:] District of Columbia supreme court. No. 682. U. S. *ex rel.* Alfred L. Bernardin *vs.* Benjamin Butterworth, Commissioner of Patents. Court of Appeals, District of Columbia. Filed May 5, 1897. Robert Willett, clerk.

65 In the Court of Appeals of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN, Appel- }
lants,
vs.
BENJAMIN BUTTERWORTH, Commissioner of Patents, Ap- }
pellée. } No. 682.

Now comes here the appellant and moves the court that the printing of the record in this case be dispensed with, and for cause thereof shows to the court the stipulation this day filed between counsel for the respective parties.

JULIAN C. DOWELL,
Attorney for Appellant.

Endorsed: Court of Appeals, D. C., April term, 1897. No. 682. United States *ex rel.* Alfred L. Bernardin, appellant, *vs.* Benjamin Butterworth, Commissioner of Patents. Motion to dispense with printing. Court of Appeals, District of Columbia. Filed May 7, 1897. Robert Willett, clerk.

66 In the Court of Appeals of the District of Columbia.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN, Appel- }
lant,
vs.
BENJAMIN BUTTERWORTH, Commissioner of Patents, Ap- }
pellée. } No. 682.

It is stipulated and agreed between counsel for the respective parties to the above cause that the petition of the appellant herein is based upon the same state of facts as the petition in the case of The United States *ex rel.* Alfred L. Bernardin *vs.* John S. Seymour, Commissioner of Patents, before the Court of Appeals, October term, 1896, No. 603, which latter case abated by reason of the resignation of John S. Seymour of the office of Commissioner of Patents, and that the issues in this case are the same as the issues in the aforesaid case No. 603, wherein it was adjudged by this court that the judgment of the supreme court dismissing the petition for a writ of

mandamus be affirmed. Wherefore it is agreed that with the consent of the court the record herein need not be printed.

JULIAN C. DOWELL,
Attorney for Appellant.
W. A. MEGRATH,
Attorney for Appellee.

Endorsed: Court of Appeals, D. C., April term, 1897. No. 682. United States *ex rel.* Alfred L. Bernardin, appellant, *vs.* Benjamin Butterworth, Commissioner of Patents. Stipulation of counsel. Court of Appeals, District of Columbia. Filed May 7, 1897. Robert Willett, clerk.

67

MONDAY, May 10th, A. D. 1897.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN, Appellant,
vs. } No. 682.
BENJAMIN BUTTERWORTH, Commissioner of Patents.

On motion of Mr. Julian C. Dowell, of counsel for the appellant, it is ordered by the court that the printing of the record in the above-entitled cause be dispensed with, as per stipulation of counsel. Whereupon this cause was submitted to the consideration of the court on the transcript of record filed herein.

68 UNITED STATES *ex Rel.* ALFRED L. BERNARDIN, Appellant,
vs. } No. 682.
BENJAMIN BUTTERWORTH, Commissioner of Patents.

Opinion.

The allegations of the petition for the writ of mandamus prayed for in this case to Benjamin Butterworth, Commissioner of Patents, are substantially the same as those contained in the former petition filed by the same plaintiff against John S. Seymour, as Commissioner, and the same may be said of the returns made by each defendant to the writ. There is one error in the petition concerning the ending of the former suit, however, that should be noted. The allegation is that the former suit abated in this court because of the retirement of Commissioner Seymour from the said office and the succession of Commissioner Butterworth. The change in the office did not occur until April 12, 1897, and the judgment in the former case affirmed the judgment appealed from on March 1, and the mandate was issued to the court below on April 10, after a motion for a reargument had been overruled.

The case has been submitted on the argument made in the former case and involves but the one question, namely, the constitutionality of the act of Congress conferring upon this court the jurisdic-

tion to entertain appeals from the decisions of the Commissioner of Patents in certain cases. For the reasons given in the opinion in that case the judgment must be affirmed, with costs; and it is so ordered.

SETH SHEPARD,
Associate Justice.

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TUESDAY, May 11th, A. D. 1897.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN, }
Appellant, }
vs. } No. 682. April
BENJAMIN BUTTERWORTH, Commissioner of Pat- } Term, 1897.
ents.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

May 11, 1897.

70

TUESDAY, May 25th, A. D. 1897.

UNITED STATES *ex Rel.* ALFRED L. BERNARDIN, Ap- }
pellant, }
vs. } No. 682.
BENJAMIN BUTTERWORTH, Commissioner of Patents.

On motion of Mr. J. C. Dowell, attorney for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

71 Know all men by these presents that we, Alfred L. Bernardin, as principal, and Oscar C. Fox, as surety, are held and firmly bound unto Benjamin Butterworth, Commissioner of Patents, in the full and just sum of three hundred dollars, to be paid to the said Benjamin Butterworth, Commissioner of Patents, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of May, in the year of our Lord one thousand eight hundred and ninety seven.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Alfred L. Bernardin and Benjamin Butterworth, a judgment was rendered against the said Alfred L. Bernardin, and the said Alfred L. Bernardin have come into court and prayed that a writ of error to the Supreme Court of

the United States be granted him, which was done, having obtained said writ and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Benjamin Butterworth, Commissioner, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such, that if the said Alfred L. Bernardin shall prosecute said writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ALFRED L. BERNARDIN. [SEAL.]
OSCAR C. FOX. [SEAL.]

Sealed and delivered in the presence of—

ALEXANDER GILCHRIST.
CURRAN A. D. BRUSH.
CHAS. E. RIORDON.

Bond satisfactory.

W. A. MEGRATH,
Counsel for Com'r of Patents.

Approved by—

R. H. ALVEY, *Ch. Justice.*

72 STATE OF INDIANA, }
Vanderburgh County, } ss:

Before me, a notary public within and for the county and State aforesaid, this day personally came Alfred Bernardin and duly acknowledged the execution of the foregoing bond. Witness my hand and official seal this 28th day of May, 1897.

E. M. BINGEL,
Notary Public, V. C.

[Endorsed:] No. 682. U. S. ex rel. Alfred L. Bernardin vs. Benjamin Butterworth, Commissioner of Patents. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 7, 1897. Robert Willett, clerk.

73 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between United States ex rel. Alfred L. Bernardin, appellant, and Benjamin Butterworth, Commissioner of Patents, appellee, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and

full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller,
Seal Court of Appeals, Chief Justice of the United States, the 7th
District of Columbia. day of June, in the year of our Lord one
thousand eight hundred and ninety-seven.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

74 UNITED STATES OF AMERICA, ss:

To Benjamin Butterworth, Commissioner of Patents, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein United States *ex rel.* Alfred L. Bernardin is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 7 day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

R. H. ALVEY,
*Chief Justice of the Court of Appeals
of the District of Columbia.*

Service accepted June 7, 1897.

W. A. MEGRATH,
Counsel for Com. of Patents.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-
7, 1897. Robert Willett, clerk.

75 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing is a true and complete transcript of the record and all proceedings in said Court of Appeals in the case of United States *ex rel.* Alfred L. Bernardin, appellant, *vs.* Benjamin Butterworth, Commissioner of Patents,

No. 632, April term, 1897, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, In testimony whereof I hereunto subscribe my name and affix the seal of said
District of Columbia. Court of Appeals, at the city of Washington, this 15th day of June, A. D. 1897.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,617. District of Columbia Court of Appeals. Term No., 404. The United States *ex rel.* Alfred L. Bernardin, plaintiff in error, *vs.* Benjamin Butterworth, Commissioner of Patents. Filed June 28th, 1897.